United States Court of Appeals

for the Second Circuit

APPENDIX

76-7348

United States Court of Appeals

For the Second Circuit

B

BOSTON M. CHANCE, LOUIS C. MERCADO, *et al.*,
Plaintiffs-Appellees,

against

THE BOARD OF EXAMINERS,
Defendant-Appellant,

and

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK
and THE CHANCELLOR OF THE CITY SCHOOL DISTRICT,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

VOLUME I, PART B
(Pages 316a to 640a)

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Plan Proposed by the Board of Examiners, Board of Education and the Chancellor, for Licensing Supervisors in the New York City School System.

Introduction

This proposal outlines a procedure for the development of examinations by the Board of Examiners to fulfill its statutory responsibility to provide examinations for the licensing of supervisors on the basis of "merit and fitness" through the use of "open qualifying" examinations. To achieve this objective the proposal provides for:

(1) Job analyses of all supervisory positions;

(2) Development of job-related examinations which shall consist of the following essential steps - -

Step 1 shall consist of a comprehensive assessment program, whose results shall be scored and reported in a manner more useful to the new Community School Board type of administration and which shall result in the provisional licensing of all eligible applicants except those who fail to meet levels of minimum acceptable performance.

Step 2 shall consist of an on-the-job performance evaluation of persons who have served with provisional licenses, and shall result in the permanent licensing of those found to have performed reasonably.

(3) A procedure for validating examinations.

The goals of the proposed program are:

(1) to develop non-discriminatory personnel selection policies without abandoning the essential elements

of a merit system;

(2) to build in performance evaluation as a key component of the licensing process;

(3) to insure employing authorities a broad choice among qualified applicants.

Accordingly, the primary purposes of the Board of Examiners' evaluation at Step 1 are to screen out those who fail to meet levels of minimum acceptable performance, and with respect to all other applicants to provide community board and Central Board of Education hiring authorities with the maximum useful information possible so that they will have an informed basis for making decisions regarding the selection of those most highly qualified for service in their particular schools and districts.

I. Job Analysis

1. The Board of Education, in consultation with the Board of Examiners and other interested persons and groups, will develop job analyses for all positions for which the Board of Examiners is required to conduct examinations. The job analysis will be based on a determination of the job behaviors which include the tasks the person is called upon to perform, the amount of time devoted to these tasks, their relative importance, and the knowledge and skills which enable a person on the job to perform these tasks successfully. The proposed procedure should be viewed as a model for analyzing all jobs although specific procedures might differ for specific

jobs. As a general rule, the job analysis will be developed from data which will be accumulated in the following way:

A. One resource in developing the job analysis will be analytic descriptions of the handling of such jobs by incumbents presently serving in such positions. To utilize this resource observers selected by the Board of Education who have a background in the specific license area and/or are trained in job analysis (could be non-pedagogues) will be trained and periodically retrained in observation techniques. These observers will visit school sites to observe incumbents in the position to develop descriptions of the work they are performing. Sufficient numbers of all-day visits will be made to the schools over representative periods to insure that the description includes both daily and periodic tasks. Observers will be required to record all tasks performed by incumbents indicating not only a description of the task but the time allotted to each and to indicate the relative importance of the described behavior in terms of effective performance. To insure that the analysis includes consideration of the widely varying schools and districts in the City of New York, the sampling will include incumbents in schools located in districts of varying socio-economic levels. Any other steps necessary to assure meeting the differing needs of various

districts will be fully considered.

B. Observed incumbents will be asked to provide the Board with a log of their activities in the job.

C. Incumbents' logs will be compared with the observers' logs developed in accordance with (A) above. The incumbent's supervisor will evaluate both the observer's log and the incumbent's description to determine the relative importance of the described behavior in terms of effective performance. The job description will incorporate observed and reported data, together with the supervisor's judgments.

D. The Chancellor, Community Superintendents, Community School Boards and/or Parent Associations will be consulted as to their perceptions of the job. Such perceptions shall be considered in the development of the job description.

E. As a further effort to insure the soundness of the job analyses, the Board of Education will subject each analysis to review by the following:

1. A Community Superintendent or Central School Superintendent.
2. A college or university specialist in the relevant area.
3. A personnel specialist from cutside the New York City School System.
4. An incumbent supervisor in the relevant category.

5. A Community School Board representative designated by the Chancellor.

Where there is an appropriate group which is representative of any of the aforesaid categories, the Board will seek designees from such group. However, the final selection shall be by decision of the Board of Education.

The designees shall review each job analysis and shall make recommendations to the Board concerning same. The decision of the Board of Education, however, shall be final.

2. Based on the data developed in "1" above, the Board of Education shall prepare a job analysis and description for each position for which examinations are to be conducted. This job analysis shall set out and fully elaborate all of the important qualities and/or behaviors necessary for performance of the job. It shall also indicate the relative importance of the various qualities and behaviors and the degree of significance each has in determining overall effective performance. In drawing up these analyses the views of incumbents, their supervisors and those persons consulted pursuant to "D" above, as well as pertinent research literature shall all be taken into account.

The Chancellor and the Board of Education will also utilize the process of developing job analyses to review existing job titles, combining titles and/or creating new titles, where appropriate.

As a further aspect of preparing job analyses every effort will be made to identify common elements in jobs which might lend themselves to assessment in a common test. Similarly,

in utilizing job analyses every effort will be made by the Board of Examiners to identify common elements in jobs which might lend themselves to assessment in a common test.

In order to insure broad public acceptance as to the objective implementation of the procedures set forth herein and in "1" above the Board of Education will retain a recognized consulting firm to develop and prepare the first three job analyses as prototypes pursuant to the procedures set forth herein and in "1" above and/or such other procedures as the firm deems appropriate. The prototype analyses shall cover the positions of Principal - Elementary School, Assistant Principal - High School (Supervision), and Assistant Principal - Elementary and Junior High. These positions cover the largest number of people in the supervisory categories, thus permitting the program to start in a meaningful way. These analyses will thereafter serve as models for future job analyses to be developed by the Board of Education. In doing these analyses the consulting firm shall be guided by the goals described supra of identifying common elements in jobs which might lend themselves to assessment in a common test, and of reviewing existing job titles with a view toward making recommendations to the Chancellor and Board of Education regarding the combination of titles and/or creation of new titles, where appropriate. The consulting firm shall also recommend a program for the selection and training of persons, to conduct subsequent job analyses. The Board of Education has designated American Institutes for Research, 3301 New Mexico Avenue N.W., Washington, D.C. 20016, as its consultant in connection with the development of job analyses for prototype

examinations. The Board of Education, in its discretion, may use consultants to perform services in the development of future job analyses.

3. The Board of Examiners will determine the feasibility of the development of tests for families of jobs that require similar qualities and behaviors. It would then be possible for similar tests to be administered for a group of jobs that call for similar knowledges, skills and behaviors. The Board of Examiners, in its discretion, may use consultants to perform services in this connection.

II. Job-Related Examinations

The Board of Examiners will develop examinations based on the aforesaid job analyses which measure the applicant's capacity to perform the significant job requirements as indicated by the analysis. This examination process will be divided into two steps. Step 1 will consist of a series of tests to be given to all eligible applicants for the primary purpose of evaluating the applicants' strengths and weaknesses. All persons who meet levels of minimum acceptable performance under Step 1 shall be declared eligible for provisional appointment to the position in question. Step 2 of the examination process will be administered to those persons who secure such provisional appointment. It shall consist of an on-the-job performance evaluation at the end of one school year of provisional service. Any person found to be performing reasonably in the Step 2 evaluation shall be awarded a permanent license for the position in question.

A. Description of Step 1 Tests

A variety of tests may be used at this stage. They may or may not include written examinations, depending on the needs of the particular situation and the nature of the qualities being evaluated. These Step 1 tests are likely to include some combination of the following:

1) Situational tests or job simulations - tests which place the applicant in a realistic job setting and call upon him to exhibit appropriate behavior. Thus, if administrative ability is a job requirement, an in-basket test may be used. This test uses a hypothetical but realistic in-basket containing letters, memoranda, records

of incoming telephone calls and other documents normally found in the in-basket of the school administrator. The applicant is given the necessary background information concerning the school in which, as principal, he would be faced with the specific in-basket. He is told that he is the incumbent principal and that he must respond to the materials as he would actually respond on the job by

a) handling certain matters himself immediately
b) handling others himself at a later time
c) delegating some to staff for immediate action and
d) delegating others to staff for later action.

After a period of study of the documents, he may be asked in an interview to give the reasons for the decisions he has made in handling the in-basket and to defend them.

2) Job knowledge tests - written and/or performance tests which measure the applicant's knowledge of subject matter required by the job. Thus an applicant for the position of Assistant Principal Supervision (Mathematics) D.H.S. might be required to demonstrate a knowledge of the curriculum and materials of his subject to the extent that the job analysis identifies that knowledge as important to the performance of the job.

3) Tests of communication skills - written and/or oral tests which will require the applicant to

demonstrate his ability to write and speak effectively to students, staff, parents and the community.

4) Tests of special experience - tests designed to give an applicant the opportunity to demonstrate his knowledge of special areas that may be deemed important by particular Community School Boards, e.g., knowledge of a foreign language or knowledge of the culture of a particular ethnic group.

5) Physical and medical test.

6) Inspection test - evaluation of the performance of an applicant on the job currently held. Every effort will be made to include such evaluations in the Step 1 assessment, although considerations of cost may preclude extensive performance evaluation in some examinations involving large number of applicants.

In order to insure that tests are job related, they will be created by closely matching the tests and test tasks to the important elements of behavior on the job as identified in the job analysis. The job analysis will be reviewed and selected behaviors listed will be translated into test tasks. The sampling of test tasks will reflect in microcosm the complex conditions of the job itself. Each test item in a written test and each test, be it interview or simulation, will be identified by a code referring to a specific item on the job analysis. This cross reference system will insure that test tasks used will be based on the job analysis. Test items will reflect the relative importance assigned to the task in the job analysis.

B. Reporting of Results of Step 1

In the past, specific weights were attached to each one of the battery of tests with a few exceptions (written English, physical and medical, and records were rated either satisfactory or unsatisfactory). A candidate had to achieve a weighted average of 60 per cent on the battery of tests to pass. If a candidate scored less than 50 per cent on any part of the examination, he was eliminated. If he obtained 50 per cent or more, he was continued in the examination but he had to compensate for marks lower than 60 per cent because he had to achieve a weighted average of 60 to pass.

To adapt the testing system to the needs of a Community School Board type of administration, test results will be reported in a manner completely different from heretofore. Instead of a composite grade, a profile of performance will be made available to the Central Board or to Community School Boards, whichever has jurisdiction, for each qualified candidate. This profile will present an assessment of the performance of each qualified candidate in all tests without specific weight and without exact composite numerical grades.

The assessment will also include a narrative report of the candidate's performance in the various areas tested as previously determined by the job analysis. For example, the assessment of a candidate in a principal's examination might report on the following areas:

1) managerial abilities (e.g., handling of a variety of problems by proper organization, planning, imagination and decision-making);

2) supervisory abilities (e.g., competency to observe classroom teaching insightfully and

to contribute to the improvement of teacher performance);

3) interpersonal relationships (e.g., communications skill, sensitivity to the role of participants in a crisis situation, awareness of the human factors operative in a school setting).

The standards for assessment of performance on each test will be established by experts chosen by the Board of Examiners in the areas covered and assessments in accordance therewith will be made by examiners chosen for their expertise in the area covered by that test. Thus, in evaluating performance on an administrative in-basket, examiners will be drawn from a pool of experienced administrators in education and industry who will have participated in the job analysis or who will be familiarized with the adminstrative component of that analysis. The Board will include, where available, as assistant examiners and examination assistants qualified personnel, from the varied racial and ethnic groups represented in the New York community. The examiners will rate performance in accordance with a scoring guideline that will identify the significant elements in the in-basket and levels of minimum acceptable performance based on the guideline.

Similarly, in a supervisory simulation, standards and the level of minimum acceptable performance would be set by pooling expert opinion of those who had wide experience in supervising instruction in a variety of schools and who were thoroughly familiar with the content and methodology of the curriculum areas involved. They would view a representative videotaped lesson, and identify significant areas of strength

and weakness in the performance of the teacher conducting the lesson and specific ways in which that performance could be improved. The candidate would appear before one of a number of panels of examiners consisting of school supervisors, university professors or other experts in supervision familiar with the specific subject area and would evaluate the lesson and present a program he would seek to implement to improve the teacher's performance.

No assistant examiner or examination assistant shall participate in the administration of any test without having first received appropriate training.

A sample profile format follows on the next page.

Sample Assessment Profile Format

(The tests indicated are merely examples of those which might be used. Total assessment is not restricted to these examples.)

Understanding of Essential Principles of Administrative Behavior (as measured by "in-basket" situations)
Ability to Evaluate Observed Classroom Teaching and to Effect Improvement (as measured by response to actual teaching)
Understanding of Human Relations Principles Involved in School Management (as revealed by reaction to taped situations)
Understanding of the Educational Process in the Urban Setting (as revealed in a written test on educational literature - for entry level as chairman or assistant principal)
Communications Skills: Ability to Communicate to Staff, Students, Community (as revealed in simulated tasks)
Skills in English Communication (as revealed in a writing sample - for entry level as chairman or assistant principal)
Inspection Test
Physical and Medical Test
Record, Including character and evaluation of past experience (including fingerprint check required by Board of Education)
Special Skills Tested at Applicant's Request (e.g., knowledge of Spanish)
Special Experience (identified from vita supplied by applicant and verified by the Board of Examiners)

It can be seen from this sample profile that, though the candidate is qualified overall, he is unqualified in one of the areas tested. In the event that the performance of the applicant is determined not to meet the level of minimum acceptable performance in an area deemed essential by the job analysis, he would be rated unqualified and not recommended for licensing and a place on the qualified list. This level of minimum acceptable performance shall be set with a view toward screening out the unqualified, consistent with the primary purposes of the Step 1 evaluation which are to ensure employing authorities the broadest possible choice among qualified applicants, and to provide with respect to such applicants the maximum useful information possible so that the employing authorities will have an informed basis for making decisions regarding the selection of those most highly qualified for service in their particular schools and districts. A rating of unqualified in one or more areas not deemed essential by the job analysis would not prevent the applicant from being placed on the qualified list, although said ratings would of course be reflected in the applicant's assessment profile.

Upon receipt of the list of qualified eligibles, together with their assessment profiles and narrative report, each Community School Board could evaluate the indicated achievement levels of each eligible in the lights of its own needs, attaching more importance to some aspects of the total assessment and less importance to others. Thus, a candidate who did poorly in English communication but well in administration and supervision might be more acceptable

to one Community School Board than to another. Another aspect of the profile would be the evaluation of additional skills claimed by the applicant; thus, an applicant who claimed fluency in Spanish would be tested for that skill and this additional qualification will be reported together with the other aspects of his assessment.

The Board of Examiners would undertake to provide a manual to help Community School Boards interpret the results reported and would consult upon request with any Community School Board in matters of personnel selection. Further, in the case of applicants whose assessment profiles did not include adequate evaluations of prior performance, the Board would provide additional assessment service. Each Community School Board could submit to the Board of Examiners a list of reasonable length of qualified persons in whom they were interested for a particular supervisory position, for an assessment of their performance in the job they currently hold. The Board of Examiners would evaluate by an on-the-site inspection by a team of experts each eligible as to performance in his current job, wherever he may be serving, and submit a report of its findings to the Community School Board.

C. Frequency of Step 1 Examinations and Establishment of Continuing Eligible Lists for Persons With Provisional Licenses

The parties agreed to, and any settlement agreement is conditioned upon, the entry of a remedial order by the Court providing that, in order to maximize the opportunity for qualified minority applicants to compete for supervisory positions:

1. The Step 1 screening process for any particular examination shall be completed as quickly as is administratively feasible.

2. Step 1 examinations for every separate job title for which there are vacancies shall be ordered by the Chancellor in connection with the Community School Board Consultative Council as frequently as it is administratively feasible for the Board of Examiners to give such examinations and it appears appropriate, in order to insure employing authorities the broadest possible choice of qualified applicants. In any event, said examinations shall be ordered and given whenever the number of persons with provisional licenses on an existing list falls to 50% of the number on the list at the time of its establishment.

3. Successful candidates for provisional licensure shall have their names added to, and shall remain on, eligible lists for a period of four years.

The provisions of paragraphs "1" through "3" above shall be effective for a period of 5 years from the date of the announcement of the last prototype examination, notwithstanding any provision to the contrary contained in any law, regulation or collective bargaining agreement, including specifically N.Y. Educ. Law § 2590-j.4.(f).

The announcement of examinations by the Board of Examiners shall not precede the giving of such examination by more than six weeks.

D. Phasing Out of Interim System of Licensing on Basis of Performance Evaluation and of Interim System of Filling Vacancies

1. With respect to each supervisory job title, the interim system of licensing on the basis of performance evaluation established pursuant to this Court's orders of July 12, 1973, shall continue in effect for each job title until:

a) The promulgation of an announcement of an examination for that title by the Board of Examiners at which time the interim system of evaluation for such title shall forthwith cease, provided, however, that all persons eligible for performance evaluation whose applications for such evaluation are filed prior to the date of said announcement, shall be evaluated pursuant to the interim system of performance evaluation and, where appropriate, licensed.

b) If no announcement of examination is made for any particular job title, the interim system of performance evaluation shall cease on the later of the following dates:

(1) The expiration date of any existing eligible list for a particular job title or,

(2) one year from the date of the announcement by the Board of Examiners of the last of the aforementioned three prototype examinations.

Notwithstanding the foregoing provisions of this subparagraph (b), all persons eligible for performance evaluation whose applications are filed prior to the later of the aforesaid dates, shall be evaluated

pursuant to the interim system of performance evaluation and, where appropriate, licensed.

2. Pending the promulgation of a list of persons provisionally licensed for a particular job title pursuant to Step 1 hereof, vacancies in such title shall continue to be filled in accordance with the provisions of Paragraph VIII of the July 12, 1973 orders of this Court, provided, however, that licenses shall not be granted to persons filling such vacancies in accordance with the performance evaluation procedure except as provided in paragraph "1" above.

3. Upon promulgation of a list of persons provisionally licensed for a particular job title pursuant to Step 1 hereof, the interim system of appointment to positions in such title described in Paragraph VIII of the orders of July 12, 1973 shall forthwith cease.

E. Description of Step 2 Test

This step shall consist of on-the-job performance evaluation, after one school year of service, of any person given a provisional appointment after qualifying under Step 1. A candidate will be rated satisfactory under Step 2 if he demonstrates reasonable performance on the job and will then be awarded a permanent license for the position in question.

The on-the-job evaluation will assess the candidate's performance in terms of the essential elements of the job analysis through such activities, for example, as the following: classroom visits and a study of the applicants' efforts to improve teacher performance (e.g., post-observation

conferences and reports, workshops, inter-visitation program, and demonstration lessons); interpersonal relations with staff and students (as evidenced, e.g., in staff meetings, consultative council meetings, and meetings with student government officers); relations with parents and community (as evidenced, e.g., in planning parent meetings, in involving community persons in advisory capacities, in using community resources in the instructional program); discussion with the applicant and his supervisor concerning the goals of the school, major problems that the applicant has faced in achieving these goals, and steps he has taken to solve these problems and provide a wholesome school environment and an effective instructional program.

The panel conducting the evaluation will, in assessing the applicant's performance, consult with a broad cross-section of persons familiar with the applicant's work. For example, in the case of an elementary school principal, this would normally include the candidate's supervisors, his fellow administrators, teachers working under him, students and parents, as well as any persons designated by the community superintendent or the community board.

F. Staff

The Board of Examiners shall have as a major goal the development of a full time, permanent staff of persons drawn not only from education, but from such other fields as testing and measurement and private industry, as well as the use of examination assistants from outside the educational profession. The Board shall develop and publish appropriate written selection criteria for both assistant examiners and

examination assistants and shall develop appropriate training procedures for such staff.

No member of the staff shall participate in the administration of any test without having first received appropriate training. Both assistant examiners and examination assistants shall include, where available, qualified personnel from the varied racial and ethnic groups represented in the New York community and from outside the education profession. Nothing contained herein shall be deemed to contravene the provisions of Section 2659 of the New York State Education Law regarding the nomination or approval by the Chancellor or Community Superintendent of examination assistants.

G. Appeal Procedures

The program described above will continue the same safeguards that are currently in effect, namely, the right of the applicants to full disclosure of the guidelines used in the assessment process with the right to appeal from any or all of the findings at both Step 1 and Step 2. Such appeal shall be made in accordance with Section 13 of the By-Laws of the Board of Examiners (copy of which is attached hereto) and may challenge any aspect of the examination including whether the examination is consistent with the general standards and procedures for testing at Step 1 and Step 2.

The Board of Examiners will apprise applicants of their right to appeal, of the procedures to be followed, and of the procedures available to obtain review of any appeal denied by the Board of Examiners.

III. Validation

The Board of Examiners will develop procedures to validate Steps 1 and 2 and the testing program on an on-going basis. In order to assure that these validation procedures are properly developed and performed, the Board of Examiners shall designate Development Dimensions, Inc., Suite 419, 250 Mount Lebanon Boulevard, Pittsburgh, Pennsylvania 15234, as its consultant or consulting agency to design and conduct validation studies of the examinations for the three prototype positions referred to in Section 1 supra. In carrying out its task the consultant or consulting agency shall be directed to design and implement validation procedures which are consistent with applicable law. The procedures so developed will serve as a model for subsequent validations, as appropriate.

The testing process shall be revised as necessary to make it consistent with the findings of the validations.

IV. Licensing Procedure

Candidates who are found to be qualified as a result of the Step 1 procedures described above shall be placed on an "eligible list" promulgated by the Board of Examiners and certified to the Division of Personnel of the Board of Education. Persons on such a list shall be eligible for provisional appointment to the jobs for which they have been tested. Once such a list has been established, appointing authorities shall be free to fill supervisory vacancies with persons who possess such provisional licenses or with persons who possess licenses granted pursuant to the interim system of performance evaluation or with persons who possess licenses granted pursuant to the previous system of examination.

After service in such job for one school year the provisional appointee must be evaluated in accordance with Step 2 hereof. Those Candidates found to have performed satisfactorily in accordance with the Step 1 on-the-job evaluation described above, shall be licensed. The Step 2 evaluation shall be completed within the semester following the required school year of provisional service.

V. Reporting Requirements

A. For the purpose of determining or securing compliance with the Final Judgment, and for no other purpose, and subject to the entry of an appropriate protective order, the defendants will provide the following information with respect to the three prototype examinations described above in this Plan at the times indicated below:

1. Job Analyses

   Upon completion of the job analyses, the Board of Education will submit the Consultant's report to plaintiffs' counsel and to the Court.

2. Development of Step 1 examinations

   Upon announcement of the holding of a prototype examination, the Board of Examiners will provide plaintiffs' counsel and the Court with a description of the scope of the examination.

3. Administration of Step 1 examination

   (a) Copies of the examination announcement will be submitted to plaintiffs' counsel and the Court at the time

(b) Promptly after examinations are held, the following shall be given to plaintiffs' counsel and submitted to the Court.

(1) Copies of examinations.

(2) A report on the racial and ethnic composition, i.e., black, Puerto Rican or non-minority, of the examination assistants who administer the examination.

(3) A report on the racial and ethnic composition of applicants taking, passing, and failing the examinations.

(4) A copy of the notice given to applicants regarding their right of appeal.

4. Development and Administration of Step 2 examinations.

Promptly after the completion of any prototype Step 2 examinations, the Board of Examiners shall give to plaintiffs' counsel and submit to the Court a report on the ethnic and racial composition of examination assistants who conducted Step 2 examinations.

5. Validation Reports

(a) Promptly after the holding of each Step 1 prototype examination, the Board of Examiners shall give plaintiffs' counsel and submit to the Court a report on the content

validity of such examination.

340a (b) A copy of the Consultant's validation studies shall be given to the plaintiffs' counsel and submitted to the Court promptly after it is received by the Board of Examiners.

B. For the purpose of determining or securing compliance with this Final Judgment, and for no other purpose, and subject to any legally recognizable privilege, and the entry of an appropriate protective order, defendants will provide plaintiffs' counsel with such other information with respect to the three prototype examinations described in the Plan as is necessary for them to make a determination regarding compliance with this Judgment, provided that:

1. plaintiffs' counsel give defendants reasonable written notice of the information required; and
2. the information requested is relevant to a determination concerning compliance with this Judgment; and
3. the request for information does not impose an undue burden on the defendants; and
4. the information requested will not jeopardize the security of examinations or the confidentiality of the identity of examination assistants, provided, however, that in no event shall the Board of Examiners be required to disclose to the plaintiffs' counsel the contents of actual examinations in advance of the holding of such examinations.

AMENDMENT OF BYLAWS OF THE BOARD OF EXAMINERS

Amendment No. 3 - January 18, 1972

The Board of Examiners at its meeting held on January 18, 1972, adopted the following motion:

Motion that Section 13, paragraphs 2, 3, 6 and 9 of the Bylaws of the Board of Examiners be amended as follows:

2. An appeal shall be referred for consideration and appropriate action to two members of the Board of Examiners acting as appellate examiners. In the event that two members of the Board of Examiners are not available to act as appellate examiners, an appeal shall be referred for consideration and recommendation to two appellate reviewers who took no part in the rating or conduct of the examination in which the appellant failed, such appellant reviewers to be designated by the Chairman of the Board of Examiners. The Board of Examiners may avail itself of the advisory services of examination assistants who took no part in the rating or conduct of the test in which the appellant failed.

3. Recommendations of the appellate examiners or appellate reviewers shall take the form of appropriate reports and be presented to the Board of Examiners for its approval. In the absence of a quorum, the Chairman of the Board of Examiners shall process the appeal and shall report all appeals acted upon by the Chairman to the Board of Examiners at a subsequent meeting at which a quorum is present. When the appellate examiners or appellate reviewers recommend that an appeal be sustained, the report shall include provision for the reinstatement of the application involved.

6. The standards to be applied in passing upon appeals in written or supervision tests shall be the same as those applied in the rating of the answers of non-appellants. In this connection, the function of the appellate examiners or the appellate reviewers shall be to recommend any revision of appealed ratings necessary to bring them into accord with such standards. The appellate examiners or the appellate reviewers shall also correct any clerical errors or omissions which they may find.

9. No second appeal shall be entertained except by consent of the Board of Examiners or the Chairman of the Board of Examiners in the absence of a quorum. Such consent shall be given only upon the presentation by the appellant of new material evidence that could not with due diligence on his part have been presented in the first instance.

Matter underlined is new.

ATTACHMENT

APPEALS

342a

Section 13. 1. An applicant who has been refused license or a certificate because of an unsatisfactory rating in any examination or in any test or other part of an examination or because of ineligibility, shall have the right to file an appeal, provided that such appeal is filed within a period of time following refusal of license or certificate specified by rules and regulations adopted by the Board of Examiners. The form and manner in which an appeal may be filed shall also be determined by said rules and regulations. The same right of appeal shall also be accorded to any licensee or certificated person whose license or certificate has been terminated by reason of his failure to meet examination or eligibility requirements. However, in regular examinations where, in the judgment of the Board of Examiners, the schedule of examinations permits refiling for another examination prior to the time that an appeal could reasonably be acted upon, no appeals will be entertained except in the case of those applicants who have been refused license because of an unsatisfactory rating in the appraisal of record, or an unsatisfactory rating in the physical and medical test, or because of ineligibility. In an unassembled examination and in an emergency examination for substitute license, an applicant who has been refused license because of unsatisfactory rating in the appraisal of record, or an unsatisfactory rating in the physical and medical test, or because of ineligibility may appeal from such determination. The Board of Examiners may adopt rules and regulations governing appeals in examinations in which minimum ratings are substituted for pass marks in two or more tests and a pass mark is set on the weighted average of two or more tests.

2. An appeal shall be referred for consideration and appropriate action to two members of the Board of Examiners acting as appellate examiners. The Board of Examiners may avail itself of the advisory services of examination assistants who took no part in the rating or conduct of the test in which the appellant failed.

3. Recommendations of the appellate examiners shall take the form of appropriate reports and be presented to the Board of Examiners for its approval. When the appellate examiners recommend that an appeal be sustained, the report shall include provision for the reinstatement of the application involved.

4. The reasons for the sustaining or the dismissal of an appeal shall be set forth in writing. In the case of the dismissal of an appeal, a summary statement of the reasons for the dismissal of the appeal shall be available for inspection by the appellant.

5. In the consideration of appeals in written tests and in supervision tests, the identity of the appellant shall be concealed from the person or persons considering the appeal.

6. The standards to be applied in passing upon appeals in written or supervision tests shall be the same as those applied in the rating of the answers of non-appellants. In this connection, the function of the appellate examiners shall be to recommend any revision of appealed ratings necessary to bring them into accord with such standards. The appellate examiners shall also correct any clerical errors or omissions which they may find.

7. Except in case of clerical error or omission, the appealed rating in a written test or any part thereof or in a supervision test shall not be raised beyond the passing grade or other required minimum grade substituted for the passing grade.

8. In general, the sustaining of an appeal on a physical and medical test and on tests other than the written or the supervision test shall provide for the granting of a continued test. However, the granting of an appeal on a performance test in which the rating is based solely on the tangible product resulting from said test and not on the procedures of the appellant observed in the course of the test, shall provide for the increase of the rating to the barely passing grade or other required minimum grade substituted for the passing grade.

9. No second appeal shall be entertained except by consent of the Board of Examiners. Such consent shall be given only upon the presentation by the appellant of new material evidence that could not with due diligence on his part have been presented in the first instance.

Plaintiffs' Notice of Motion served January 3, 1975, together with supporting affidavit of Jeanne R. Silver (plus exhibits), sworn to January 3, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE, et al.,

Plaintiffs,

-against-

70 Civ. 4141
(H.R.T.)

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK,

Defendants.

NOTICE OF MOTION

- -X

TO: Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, N. Y. 10022

Adrian Burke
Attn: Leonard Bernikow
The Corporation Counsel
Municipal Building
New York, N. Y. 10007

Attorneys for Defendants

S I R S :

PLEASE TAKE NOTICE that, upon the annexed affidavit of Jeanne R. Silver, sworn to January 3, 1975, and upon the pleadings and all other papers and proceedings had herein, and pursuant to paragraph IX of the Final Judgment herein entered July 12, 1973 against defendant Board of Examiners and the Order herein entered July 12, 1973 modifying the preliminary injunction against defendant Board of Education (hereinafter the "July 12, 1973 Orders"), plaintiffs will move this Court, at the United States Courthouse, Foley Square, New York, New York, on January 14, 1975, at 4 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, to

1. Issue an Order modifying the Final Judgment of July 12, 1973 against the defendants Board of Examiners and Chancellor herein to provide that a certain "Plan" annexed as Exhibit "A" to the affidavit of Jeanne R. Silver submitted herewith, and all its provisions and requirements shall be incorporated in such Judgment as "a Plan for the selection of supervisors within the New York City school system" and that any requirements of paragraph IX of said Judgment shall be deemed satisfied thereby and cease to be in effect, and that the defendants shall be required to proceed immediately to develop a new system for licensing and selecting supervisors in the New York City school system in accordance with the provisions of said Plan; and

2. Issue a Final Judgment containing the same terms as the aforesaid Final Judgment of July 12, 1973, as modified, against the defendant Board of Education and all other defendants herein who are not presently bound by the July 12, 1973 Final Judgment,

3. Grant such other and further relief as the Court may deem just and proper.

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New York, New York 10019

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE, et al.,

Plaintiffs,

- against -

70 Civ. 4141
(H.R.T.)

THE BOARD OF EXAMINERS, AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

AFFIDAVIT

- -X

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

JEANNE R. SILVER, being duly sworn, deposes and says:

1. I am one of the attorneys for plaintiffs in the above-captioned action. I submit this affidavit in support of plaintiffs' motion returnable January 14, 1975, for an order (1) modifying the Final Judgment against the defendants Chancellor and Board of Examiners and the Order modifying the preliminary injunction against defendant Board of Education entered herein on July 12, 1973, (hereinafter the "July 12, 1973 Orders") and (2) entering a Final Judgment against the defendant Board of Education; and in opposition to the defendants' motion returnable the same day, to modify said Judgment and Order. I am fully familiar with all prior proceedings herein bearing on said motions.

2. Defendants' motion and the first part of plaintiffs' motion are similar, each asking the Court to approve as the basis for developing a permanent new licensing system for school supervisors, a certain Plan which the parties previously submitted to the Court as the potential basis for a consent order, subject to resolution of two outstanding matters. Those two unresolved matters remain so at this time and account for important differences in the Plans each party is submitting to the Court. Subject to their resolution in the manner urged here, plaintiffs continue to believe that the Plan (Ex. "A" hereto), as fairly summarized in paragraph 5 of the affidavit

of defendant Murray Rockowitz, affords a sound basis for developing a constitutional new licensing system.

3. The differences in the Plans* submitted by plaintiffs and defendants are in the character of procedures proposed by each for reporting on the development of a permanent new licensing system (cf. Silver Aff. Ex. "A" Part V; Rock. Aff. Ex. "A" Part V) and their respective approaches to selection of consultants to perform key steps in such development (cf. Silver Aff. Ex. "A" pp. 6-7, 22; Rock. Aff. pp. 6, 22). The primary purpose of this affidavit is to explain the factual basis for our contention that defendants' reporting procedures and their attempted unilateral designations of consulting firms abrogate the conditions on which plaintiffs originally agreed upon the Plan and violate both the Plan's intention and the July 12, 1973 Orders.

4. As detailed in plaintiffs' memorandum of law submitted herewith, and further supported by the affidavit of Dr. Richard S. Barrett, annexed as Ex. "B" hereto, defendants' proposed reporting provisions can only be characterized as "minimal." Nevertheless, their motion asks authority from the Court not only to develop new supervisory examinations but to proceed to administer tests and issue licenses based on them. Paragraph IX of the Court's July 12, 1973 Orders pursuant to which defendants purport to have made this motion provides for development of a plan for a selection system. Paragraph X provides for implementation of a system only after all parties and the Court have had an opportunity to review "all relevant data relating to the new system and its development." Defendants' motion and reporting provisions seem to seek authority to implement a new licensing system pursuant to Paragraph X as if the developmental procedures and submission to plaintiffs of relevant data it requires had already been complied with. Nothing could be farther from the truth.

*Review of the Plan as previously submitted to the Court indicates that there are some typographical errors and also possible technical omissions in the provisions for transition and ultimate administration of the new two-step licensing system for which it provides. We assume that any such problems will be correctible by agreement of the parties in connection with settlement of a final order and therefore, like defendants, have submitted the Plan in exactly the form previously furnished to the Court, except for the contested provisions on consultants and reporting.

5. The only steps which defendants are known to have taken toward development of a new system, and certainly the only information they have furnished to plaintiffs about such steps, is contained in the Plan negotiated by the parties. That Plan was conceived and remains solely as a set of guidelines for the development of a system pursuant to Paragraph X of the July 12, 1973 Orders. The need for extensive developmental work before a new licensing system can emerge is clear from the discussion in the Plan as well as the assessment of plaintiffs' expert, Dr. Barrett (Ex. "B" paragraph 4).

6. While the Plan submitted to the Court is believed by plaintiffs to afford the basis for developing a sound, constitutional licensing system, it is no guarantor that such a system will emerge or that its guidelines will be faithfully adhered to. It was for that reason that plaintiffs explicitly conditioned their assent to the Plan, when it was submitted to the Court last May, upon the negotiation of effective reporting and monitoring provisions. The provisions submitted by defendants reflect the breakdown of negotiations. As indicated in our Memorandum of Law, and affirmed by Dr. Barrett in his affidavit (paragraph 5) they fall far short of the requirements of Paragraph X of the July 12, 1973 Orders and are totally inadequate, in our view, to safeguard the interests of plaintiffs and the public in speedy development of a constitutional new licensing system.

7. Plaintiffs' second reason for opposing defendants' motion is the approach they have taken to the selection of consulting firms for prototypical job analyses and validation studies required by the Plan. These tasks are of crucial importance to the development of a sound licensing system, since accuracy and sensitivity of job analyses are a prerequisite to valid and job-related tests, while validation studies will determine whether the legal requirements of validity and job-relatedness have been met. For these reasons, and particularly in view of defendants' past lack of success in gaining and using expert help to make their testing job-related (Chance v. Board of Examiners, Opin. Mansfield, J., 330 F. Supp. 203, 218-19 (S.D.N.Y. 1971), plaintiffs have consistently maintained that the selection of consultants should be made either by defendants in conjunction with plaintiffs or by impartial third parties. Defendants have now made the necessity for an

impartial selection agency even more clearly apparent by their unilateral designation of firms in breach of express understandings with plaintiffs.

8. The affidavit of the Examiners' Chairman, Murray Rockowitz, is disingenuous on this point. While it is certainly true, as Mr. Rockowitz states, that "blanks" were left for the firms' names in the Plan submitted to the Court last May, the reason was not, as he implies, to vest sole discretion in selecting consultants to defendants. The blanks were left because the defendants were unwilling to have a provision for divided jurisdiction appear in the text of the public document. Plaintiffs agreed to an informal arrangement whereby the parties would try to agree to the firms in advance of the Plan's approval, and a selection provision would therefore not be necessary. Blanks were included in the Plan so that names could be inserted when agreement had been reached and, as stated to the Court in May, the defendants accordingly submitted to plaintiffs lists of firms under consideration.

9. We have previously reported to the Court on the subsequent actions of defendants not merely in selecting these consultants unilaterally but also in deliberately denying plaintiffs the opportunity to intervene or even influence their decisions. As reflected in letters annexed as Ex. "C" hereto, the Board of Education ignored plaintiffs' repeated requests for proposals submitted by the firms on its lists and then, having furnished a manifestly inadequate proposal from one of them at the last minute, proceeded to select that firm at a public meeting over the plaintiffs' express objection. The soundness of that objection in view of the proposal submitted is confirmed by the affidavit of Dr. Barrett (Ex. "B", paras. 7, 8), whose advice we cited in making it. (Ex. "C-1,2")

10. The defendant Board of Examiners declined to furnish any proposals submitted by organizations which it considered as consultants to do the validation studies. Correspondence with one of the organizations on its list (Ex. "C" hereto) confirms that it also advised its bidders not to cooperate with our inquiries despite having assured us previously in open Court that we were welcome to communicate about the project with the firms on its list. Finally, at the December 17 hearing, the Board of Examiners

counsel advised plaintiffs and the Court that a firm had been selected.

11. Plaintiffs respectfully submit that the breakdown of negotiations with defendants over reporting provisions, the minimal character of the provisions they have included in their Plan and their determined concealment of the basis and underlying data upon which the selection of consulting firms was predicated all confirm the necessity of the detailed reporting provisions and consultant selection procedures included in our Plan. The manifest intention of Paragraph X of the July 12, 1973 Orders is to assure that before a new licensing system is implemented ground shall have been established for confidence that it will be valid and constitutional. Instead, the recent conduct of defendants has engendered doubts of the sincerity of their purpose. Provision for effective advance reporting on the licensing system's development and a guarantee that competent and impartial consultants will be selected for vital tasks are minimum safeguards against defendants' continuing their past pattern of repeatedly developing invalid, non-job-related tests. Chance v. Board of Examiners, supra, 330 F. Supp. at p. 223.

12. The second branch of plaintiffs' motion asks the Court to enter a Final Judgment making permanent the Preliminary Injunction against the defendant Board of Education as modified by the Court's July 12, 1973 Order against the Board. Plaintiffs have moved for that relief in view of the Court's expressed interest in resolving outstanding issues in this litigation and view it as an essentially technical request to which we hope the Board will consent.

13. The Preliminary Injunction and the Final Judgment herein are identical in substance. The absence of a final order against the Board of Education resulted from its unwillingness, despite having failed to defend the action, to consent to the settlement reached by the Board of Examiners and Chancellor. (Order against Board of Education July 12, 1973) In April, 1973, the plaintiffs moved for a default judgment against the Board of Education or in the alternative for modification of the preliminary injunction, and the Court granted the alternative relief, effective pending final determination of the action against it. (Order, July 12, 1973).

14. It is certainly clear now that the Board of Education does not plan to go to trial on the merits herein and that any modification of the Order against it resulting from the pending motions of plaintiffs and defendants to modify the July 12, 1973 Orders should be permanent in effect. It would be senseless, under the circumstances to continue or further modify the Preliminary Injunction against the Board, and plaintiffs therefore submit that the Final Judgment and any modification thereof should be made binding on all parties to this action.

WHEREFORE, plaintiffs respectfully request that plaintiffs' motion returnable January 14, 1975 be granted and defendants' motion returnable on said date be denied.

Jeanne R. Silver

JEANNE R. SILVER

Sworn to before me this
21st day of January, 1975

MILDRED GRAHAM
NOTARY PUBLIC, State of New York
No. 31-5621740
Qualified in New York County
Commission Expires March 30, 1975

Mildred Graham

Plan Proposed by the Board of Examiners, Board of Education and the Chancellor, for Licensing Supervisors in the New York City School System.

Introduction

This proposal outlines a procedure for the development of examinations by the Board of Examiners to fulfill its statutory responsibility to provide examinations for the licensing of supervisors on the basis of "merit and fitness" through the use of "open qualifying" examinations. To achieve this objective the proposal provides for:

(1) Job analyses of all supervisory positions;

(2) Development of job-related examinations which shall consist of the following essential steps - -

Step 1 shall consist of a comprehensive assessment program, whose results shall be scored and reported in a manner more useful to the new Community School Board type of administration and which shall result in the provisional licensing of all eligible applicants except those who fail to meet levels of minimum acceptable performance.

Step 2 shall consist of an on-the-job performance evaluation of persons who have served with provisional licenses, and shall result in the permanent licensing of those found to have performed reasonably.

(3) A procedure for validating examinations.

The goals of the proposed program are:

(1) to develop non-discriminatory personnel selection policies without abandoning the essential elements

of a merit system;

(2) to build in performance evaluation as a key component of the licensing process;

(3) to insure employing authorities a broad choice among qualified applicants.

Accordingly, the primary purposes of the Board of Examiners' evaluation at Step 1 are to screen out those who fail to meet levels of minimum acceptable performance, and with respect to all other applicants to provide community board and Central Board of Education hiring authorities with the maximum useful information possible so that they will have an informed basis for making decisions regarding the selection of those most highly qualified for service in their particular schools and districts.

I. Job Analysis

1. The Board of Education, in consultation with the Board of Examiners and other interested persons and groups, will develop job analyses for all positions for which the Board of Examiners is required to conduct examinations. The job analysis will be based on a determination of the job behaviors which include the tasks the person is called upon to perform, the amount of time devoted to these tasks, their relative importance, and the knowledge and skills which enable a person on the job to perform these tasks successfully. The proposed procedure should be viewed as a model for analyzing all jobs although specific procedures might differ for specific

jobs. As a general rule, the job analysis will be developed from data which will be accumulated in the following way:

A. One resource in developing the job analysis will be analytic descriptions of the handling of such jobs by incumbents presently serving in such positions. To utilize this resource observers selected by the Board of Education who have a background in the specific license area and/or are trained in job analysis (could be non-pedagogues) will be trained and periodically retrained in observation techniques. These observers will visit school sites to observe incumbents in the position to develop descriptions of the work they are performing. Sufficient numbers of all-day visits will be made to the schools over representative periods to insure that the description includes both daily and periodic tasks. Observers will be required to record all tasks performed by incumbents indicating not only a description of the task but the time allotted to each and to indicate the relative importance of the described behavior in terms of effective performance. To insure that the analysis includes consideration of the widely varying schools and districts in the City of New York, the sampling will include incumbents in schools located in districts of varying socio-economic levels. Any other steps necessary to assure meeting the differing needs of various

districts will be fully considered.

B. Observed incumbents will be asked to provide the Board with a log of their activities in the job.

C. Incumbents' logs will be compared with the observers' logs developed in accordance with (A) above. The incumbent's supervisor will evaluate both the observer's log and the incumbent's description to determine the relative importance of the described behavior in terms of effective performance. The job description will incorporate observed and reported data, together with the supervisor's judgments.

D. The Chancellor, Community Superintendents, Community School Boards and/or Parent Associations will be consulted as to their perceptions of the job. Such perceptions shall be considered in the development of the job description.

E. As a further effort to insure the soundness of the job analyses, the Board of Education will subject each analysis to review by the following:

1. A Community Superintendent or Central School Superintendent.
2. A college or university specialist in the relevant area.
3. A personnel specialist from outside the New York City School System.
4. An incumbent supervisor in the relevant category.

5. A Community School Board representative designated by the Chancellor.

Where there is an appropriate group which is representative of any of the aforesaid categories, the Board will seek designees from such group. However, the final selection shall be by decision of the Board of Education.

The designees shall review each job analysis and shall make recommendations to the Board concerning same. The decision of the Board of Education, however, shall be final.

2. Based on the data developed in "1" above, the Board of Education shall prepare a job analysis and description for each position for which examinations are to be conducted. This job analysis shall set out and fully elaborate all of the important qualities and/or behaviors necessary for performance of the job. It shall also indicate the relative importance of the various qualities and behaviors and the degree of significance each has in determining overall effective performance. In drawing up these analyses the views of incumbents, their supervisors and those persons consulted pursuant to "D" above, as well as pertinent research literature shall all be taken into account.

The Chancellor and the Board of Education will also utilize the process of developing job analyses to review existing job titles, combining titles and/or creating new titles, where appropriate.

As a further aspect of preparing job analyses every effort will be made to identify common elements in jobs which might lend themselves to assessment in a common test. Similarly,

in utilizing job analyses every effort will be made by the Board of Examiners to identify common elements in jobs which might lend themselves to assessment in a common test.

In order to insure broad public acceptance as to the objective implementation of the procedures set forth herein and in "1" above the Board of Education will retain a recognized consulting firm to develop and prepare the first three job analyses as prototypes pursuant to the procedures set forth herein and in "1" above and/or such other procedures as the firm deems appropriate. The prototype analyses shall cover the positions of Principal- Elementary School, Assistant Principal - High School (Supervision), and Assistant Principal - Elementary and Junior High. These positions cover the largest number of people in the supervisory categories, thus permitting the program to start in a meaningful way. These analyses will thereafter serve as models for future job analyses to be developed by the Board of Education. In doing these analyses the consulting firm shall be guided by the goals described supra of identifying common elements in jobs which might lend themselves to assessment in a common test, and of reviewing existing job titles with a view toward making recommendations to the Chancellor and Board of Education regarding the combination of titles and/or creation of new titles, where appropriate. The consulting firm shall also recommend a program for the selection and training of persons, to conduct subsequent job analyses.

The consultant designated to develop the prototype job analyses shall be selected by a panel composed of 3 members including one chosen by the defendants herein, and one chosen by the plaintiffs. A third panelist, to be chosen by the Court, shall be a member of the faculty of a law school in the New York metropolitan area who specializes in personnel relations in the public sector.

The panel shall also choose the consultant to be designated to perform validation studies pursuant to Section III hereof.

In choosing the consultants, the panel shall be free to consider any firm, organization or individual recognized as expert in employment selection and testing, including but not limited to those recommended by the defendants and/or plaintiffs. Selections shall be made only after proposals submitted by each firm under consideration have been submitted to plaintiffs and defendants and they have been afforded opportunity to confer with the firms regarding their proposals and transmit their comments to the panel.

The panel shall be appointed within 10 days of the date of an Order by the Court incorporating this Plan, and shall make its selection of the consultant for job analyses no later than 4 weeks thereafter.

The Board of Education, in its discretion, may use consultants to perform services in the development of future job analyses.

3. The Board of Examiners will determine the feasibility of the development of tests for families of jobs that require similar qualities and behaviors. It would then be possible for similar tests to be administered for a group of jobs that call for similar knowledges, skills and behaviors. The Board of Examiners, in its discretion, may use consultants to perform services in this connection.

The Board of Examiners will develop examinations based on the aforesaid job analyses which measure the applicant's capacity to perform the significant job requirements as indicated by the analysis. This examination process will be divided into two steps. Step 1 will consist of a series of tests to be given to all eligible applicants for the primary purpose of evaluating the applicants' strengths and weaknesses. All persons who meet levels of minimum acceptable performance under Step 1 shall be declared eligible for provisional appointment to the position in question. Step 2 of the examination process will be administered to those persons who secure such provisional appointment. It shall consist of an on-the-job performance evaluation at the end of one school year of provisional service. Any person found to be performing reasonably in the Step 2 evaluation shall be awarded a permanent license for the position in question.

A. Description of Step 1 Tests

A variety of tests may be used at this stage. They may or may not include written examinations, depending on the needs of the particular situation and the nature of the qualities being evaluated. These Step 1 tests are likely to include some combination of the following:

1) Situational tests or job simulations - tests which place the applicant in a realistic job setting and call upon him to exhibit appropriate behavior. Thus, if administrative ability is a job requirement, an in-basket test may be used. This test uses a hypothetical but realistic in-basket containing letters, memoranda, records

of incoming telephone calls and other documents normally found in the in-basket of the school administrator. The applicant is given the necessary background information concerning the school in which, as principal, he would be faced with the specific in-basket. He is told that he is the incumbent principal and that he must respond to the materials as he would actually respond on the job by

a) handling certain matters himself immediately

b) handling others himself at a later time

c) delegating some to staff for immediate action and

d) delegating others to staff for later action.

After a period of study of the documents, he may be asked in an interview to give the reasons for the decisions he has made in handling the in-basket and to defend them.

2) Job knowledge tests - written and/or performance tests which measure the applicant's knowledge of subject matter required by the job. Thus an applicant for the position of Assistant Principal Supervision (Mathematics) D.H.S. might be required to demonstrate a knowledge of the curriculum and materials of his subject to the extent that the job analysis identifies that knowledge as important to the performance of the job.

3) Tests of communication skills - written and/or oral tests which will require the applicant to

demonstrate his ability to write and speak effectively to students, staff, parents and the community.

4) Tests of special experience - tests designed to give an applicant the opportunity to demonstrate his knowledge of special areas that may be deemed important by particular Community School Boards, e.g., knowledge of a foreign language or knowledge of the culture of a particular ethnic group.

5) Physical and medical test.

6) Inspection test - evaluation of the performance of an applicant on the job currently held. Every effort will be made to include such evaluations in the Step 1 assessment, although considerations of cost may preclude extensive performance evaluation in some examinations involving large number of applicants.

In order to insure that tests are job related, they will be created by closely matching the tests and test tasks to the important elements of behavior on the job as identified in the job analysis. The job analysis will be reviewed and selected behaviors listed will be translated into test tasks. The sampling of test tasks will reflect in microcosm the complex conditions of the job itself. Each test item in a written test and each test, be it interview or simulation, will be identified by a code referring to a specific item on the job analysis. This cross reference system will insure that test tasks used will be based on the job analysis. Test items will reflect the relative importance assigned to the task in the job analysis.

B. Reporting of Results of Step 1

In the past, specific weights were attached to each one of the battery of tests with a few exceptions (written English, physical and medical, and records were rated either satisfactory or unsatisfactory). A candidate had to achieve a weighted average of 60 per cent on the battery of tests to pass. If a candidate scored less than 50 per cent on any part of the examination, he was eliminated. If he obtained 50 per cent or more, he was continued in the examination but he had to compensate for marks lower than 60 per cent because he had to achieve a weighted average of 60 to pass.

To adapt the testing system to the needs of a Community School Board type of administration, test results will be reported in a manner completely different from heretofore. Instead of a composite grade, a profile of performance will be made available to the Central Board or to Community School Boards, whichever has jurisdiction, for each qualified candidate. This profile will present an assessment of the performance of each qualified candidate in all tests without specific weight and without exact composite numerical grades.

The assessment will also include a narrative report of the candidate's performance in the various areas tested as previously determined by the job analysis. For example, the assessment of a candidate in a principal's examination might report on the following areas:

1) managerial abilities (e.g., handling of a variety of problems by proper organization, planning, imagination and decision-making);

2) supervisory abilities (e.g., competency to observe classroom teaching insightfully and

to contribute to the improvement of teacher performance);

3) interpersonal relationships (e.g., communications skill, sensitivity to the role of participants in a crisis situation, awareness of the human factors operative in a school setting).

The standards for assessment of performance on each test will be established by experts chosen by the Board of Examiners in the areas covered and assessments in accordance therewith will be made by examiners chosen for their expertise in the area covered by that test. Thus, in evaluating performance on an administrative in-basket, examiners will be drawn from a pool of experienced administrators in education and industry who will have participated in the job analysis or who will be familiarized with the adminstrative component of that analysis. The Board will include, where available, as assistant examiners and examination assistants qualified personnel, from the varied racial and ethnic groups represented in the New York community. The examiners will rate performance in accordance with a scoring guideline that will identify the significant elements in the in-basket and levels of minimum acceptable performance based on the guideline.

Similarly, in a supervisory simulation, standards and the level of minimum acceptable performance would be set by pooling expert opinion of those who had wide experience in supervising instruction in a variety of schools and who were thoroughly familiar with the content and methodology of the curriculum areas involved. They would view a representative videotaped lesson, and identify significant areas of strength

and weakness in the performance of the teacher conducting the lesson and specific ways in which that performance could be improved. The candidate would appear before one of a number of panels of examiners consisting of school supervisors, university professors or other experts in supervision familiar with the specific subject area and would evaluate the lesson and present a program he would seek to implement to improve the teacher's performance.

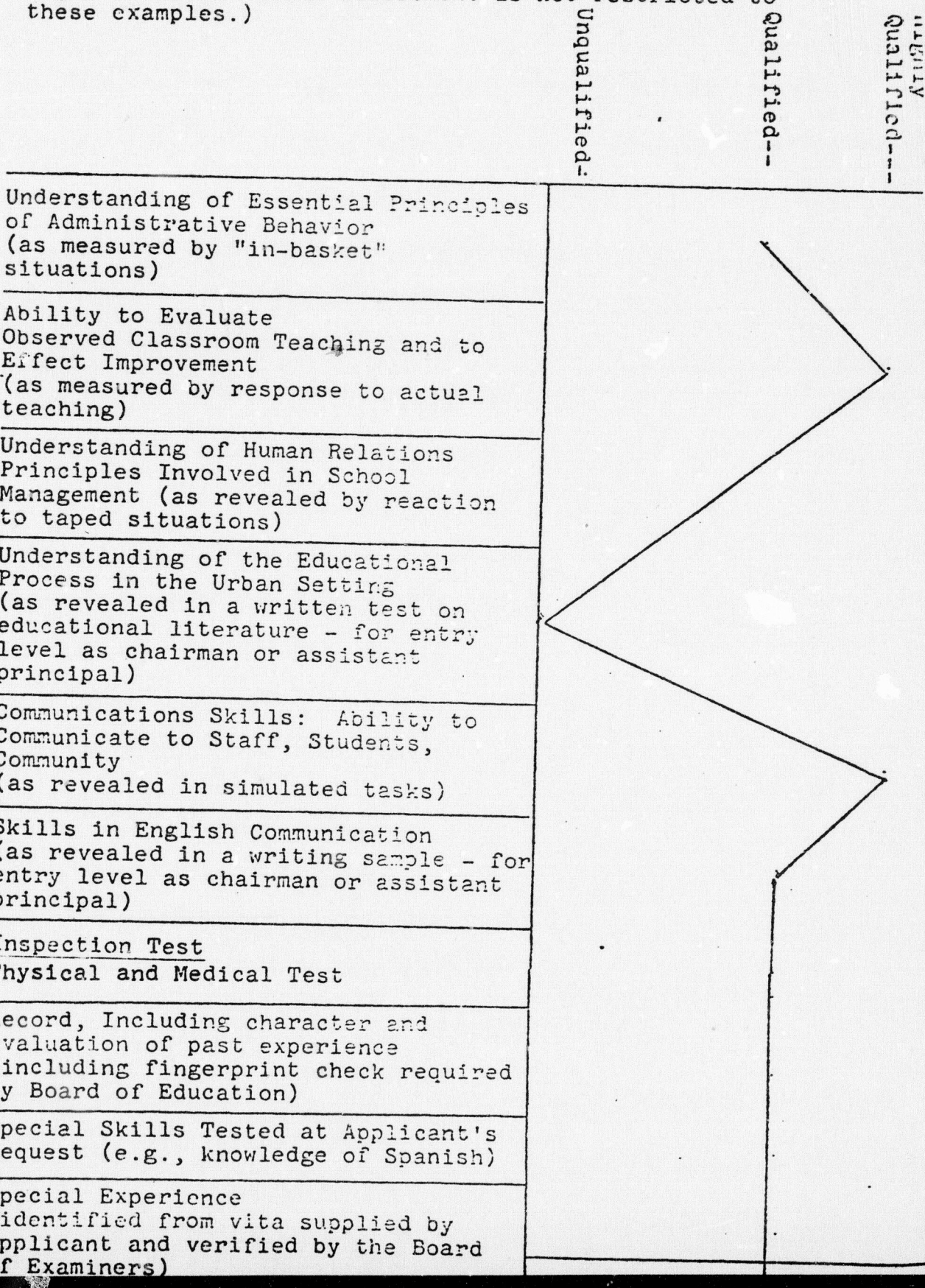
No assistant examiner or examination assistant shall participate in the administration of any test without having first received appropriate training.

A sample profile format follows on the next page.

STEP I

Sample Assessment Profile Format

(The tests indicated are merely examples of those which might be used. Total assessment is not restricted to these examples.)



It can be seen from this sample profile that, though the candidate is qualified overall, he is unqualified in one of the areas tested. In the event that the performance of the applicant is determined not to meet the level of minimum acceptable performance in an area deemed essential by the job analysis, he would be rated unqualified and not recommended for licensing and a place on the qualified list. This level of minimum acceptable performance shall be set with a view toward screening out the unqualified, consistent with the primary purposes of the Step 1 evaluation which are to ensure employing authorities the broadest possible choice among qualified applicants, and to provide with respect to such applicants the maximum useful information possible so that the employing authorities will have an informed basis for making decisions regarding the selection of those most highly qualified for service in their particular schools and districts. A rating of unqualified in one or more areas not deemed essential by the job analysis would not prevent the applicant from being placed on the qualified list, although said ratings would of course be reflected in the applicant's assessment profile.

Upon receipt of the list of qualified eligibles, together with their assessment profiles and narrative report, each Community School Board could evaluate the indicated achievement levels of each eligible in the lights of its own needs, attaching more importance to some aspects of the total assessment and less importance to others. Thus, a candidate who did poorly in English communication but well in administration and supervision might be more acceptable

to one Community School Board than to another. Another aspect of the profile would be the evaluation of additional skills claimed by the applicant; thus, an applicant who claimed fluency in Spanish would be tested for that skill and this additional qualification will be reported together with the other aspects of his assessment.

The Board of Examiners would undertake to provide a manual to help Community School Boards interpret the results reported and would consult upon request with any Community School Board in matters of personnel selection. Further, in the case of applicants whose assessment profiles did not include adequate evaluations of prior performance, the Board would provide additional assessment service. Each Community School Board could submit to the Board of Examiners a list of reasonable length of qualified persons in whom they were interested for a particular supervisory position, for an assessment of their performance in the job they currently hold. The Board of Examiners would evaluate by an on-the-site inspection by a team of experts each eligible as to performance in his current job, wherever he may be serving, and submit a report of its findings to the Community School Board.

C. Frequency of Step 1 Examinations and Establishment of Continuing Eligible Lists for Persons With Provisional Licenses

The parties agreed to, and any settlement agreement is conditioned upon, the entry of a remedial order by the Court providing that, in order to maximize the opportunity for qualified minority applicants to compete for supervisory positions:

1. The Step 1 screening process for any particular examination shall be completed as quickly as is administratively feasible.

2. Step 1 examinations for every separate job title for which there are vacancies shall be ordered by the Chancellor in connection with the Community School Board Consultative Council as frequently as it is administratively feasible for the Board of Examiners to give such examinations and it appears appropriate, in order to insure employing authorities the broadest possible choice of qualified applicants. In any event, said examinations shall be ordered and given whenever the number of persons with provisional licenses on an existing list falls to 50% of the number on the list at the time of its establishment.

3. Successful candidates for provisional licensure shall have their names added to, and shall remain on, eligible lists for a period of four years.

The provisions of paragraphs "1" through "3" above shall be effective for a period of 5 years from the date of the announcement of the last prototype examination, notwithstanding any provision to the contrary contained in any law, regulation or collective bargaining agreement, including specifically N.Y. Educ. Law § 2590-j.4.(f).

The announcement of examinations by the Board of Examiners shall not precede the giving of such examination by more than six weeks.

D. Phasing Out of Interim System of Licensing on Basis of Performance Evaluation and of Interim System of Filling Vacancies

1. With respect to each supervisory job title, the interim system of licensing on the basis of performance evaluation established pursuant to this Court's orders of July 12, 1973, shall continue in effect for each job title until:

a) The promulgation of an announcement of an examination for that title by the Board of Examiners at which time the interim system of evaluation for such title shall forthwith cease, provided, however, that all persons eligible for performance evaluation whose applications for such evaluation are filed prior to the date of said announcement, shall be evaluated pursuant to the interim system of performance evaluation and, where appropriate, licensed.

b) If no announcement of examination is made for any particular job title, the interim system of performance evaluation shall cease on the later of the following dates:

(1) The expiration date of any existing eligible list for a particular job title or,

(2) one year from the date of the announcement by the Board of Examiners of the last of the aforementioned three prototype examinations.

Notwithstanding the foregoing provisions of this subparagraph (b), all persons eligible for performance evaluation whose applications are filed prior to the later of the aforesaid dates shall be evaluated

pursuant to the interim system of performance evaluation and, where appropriate, licensed.

2. Pending the promulgation of a list of persons provisionally licensed for a particular job title pursuant to Step 1 hereof, vacancies in such title shall continue to be filled in accordance with the provisions of Paragraph VIII of the July 12, 1973 orders of this Court, provided, however, that licenses shall not be granted to persons filling such vacancies in accordance with the performance evaluation procedure except as provided in paragraph "1" above.

3. Upon promulgation of a list of persons provisionally licensed for a particular job title pursuant to Step 1 hereof, the interim system of appointment to positions in such title described in Paragraph VIII of the orders of July 12, 1973 shall forthwith cease.

E. Description of Step 2 Test

This step shall consist of on-the-job performance evaluation, after one school year of service, of any person given a provisional appointment after qualifying under Step 1. A candidate will be rated satisfactory under Step 2 if he demonstrates reasonable performance on the job and will then be awarded a permanent license for the position in question.

The on-the-job evaluation will assess the candidate's performance in terms of the essential elements of the job analysis through such activities, for example, as the following: classroom visits and a study of the applicants' efforts to improve teacher performance (e.g., post-observation

conferences and reports, workshops, inter-visitation program, and demonstration lessons); interpersonal relations with staff and students (as evidenced, e.g., in staff meetings, consultative council meetings, and meetings with student government officers); relations with parents and community (as evidenced, e.g., in planning parent meetings, in involving community persons in advisory capacities, in using community resources in the instructional program); discussion with the applicant and his supervisor concerning the goals of the school, major problems that the applicant has faced in achieving these goals, and steps he has taken to solve these problems and provide a wholesome school environment and an effective instructional program.

The panel conducting the evaluation will, in assessing the applicant's performance, consult with a broad cross-section of persons familiar with the applicant's work. For example, in the case of an elementary school principal, this would normally include the candidate's supervisors, his fellow administrators, teachers working under him, students and parents, as well as any persons designated by the community superintendent or the community board.

F. Staff

The Board of Examiners shall have as a major goal the development of a full time, permanent staff of persons drawn not only from education, but from such other fields as testing and measurement and private industry, as well as the use of examination assistants from outside the educational profession. The Board shall develop and publish appropriate written selection criteria for both assistant examiners and

examination assistants and shall develop appropriate training procedures for such staff.

No member of the staff shall participate in the administration of any test without having first received appropriate training. Both assistant examiners and examination assistants shall include, where available, qualified personnel from the varied racial and ethnic groups represented in the New York community and from outside the education profession. Nothing contained herein shall be deemed to contravene the provisions of Section 2659 of the New York State Education Law regarding the nomination or approval by the Chancellor or Community Superintendent of examination assistants.

G. Appeal Procedures

The program described above will continue the same safeguards that are currently in effect, namely, the right of the applicants to full disclosure of the guidelines used in the assessment process with the right to appeal from any or all of the findings at both Step 1 and Step 2. Such appeal shall be made in accordance with Section 13 of the By-Laws of the Board of Examiners (copy of which is attached hereto) and may challenge any aspect of the examination including whether the examination is consistent with the general standards and procedures for testing at Step 1 and Step 2.

The Board of Examiners will apprise applicants of their right to appeal, of the procedures to be followed, and of the procedures available to obtain review of any appeal denied by the Board of Examiners.

III. Validation

The Board of Examiners will develop procedures to validate Step 1 and 2 and the testing program on an on-going basis. In order to assure that these validation procedures are properly developed and performed, the Board of Examiners shall designate a firm or organization selected in accordance with the procedures for selecting a consultant to perform job analyses described in Section I.2, supra, as its consultant or consulting agency to design and conduct validation studies of the examinations for the three prototype positions referred to in Section I supra. In carrying out its task the consultant or consulting agency shall be directed to design and implement validation procedures which are consistent with applicable law. The procedures so developed will serve as a model for subsequent validations, as appropriate.

The testing process shall be revised as necessary to make it consistent with the findings of the validations.

IV. Licensing Procedure

Candidates who are found to be qualified as a result of the Step 1 procedures described above shall be placed on an "eligible list" promulgated by the Board of Examiners and certified to the Division of Personnel of the Board of Education. Persons on such a list shall be eligible for provisional appointment to the jobs for which they have been tested. Once such a list has been established, appointing authorities shall be free to fill supervisory vacancies with persons who possess such provisional licenses or with persons who possess licenses granted pursuant to the interim system of performance evaluation or with persons who possess licenses granted pursuant to the previous system of examination.

After service in such job for one school year the provisional appointee must be evaluated in accordance with Step 2 hereof. Those candidates found to have performed satisfactorily in accordance with the Step 2 on-the-job evaluation described above, shall be licensed. The Step 2 evaluation shall be completed within the semester following the required school year of provisional service.

V. REPORTING AND MONITORING REQUIREMENTS

A. Prototypical Examinations

1. Development and Administration

Defendants shall not administer Step 1 tests for any of the three prototape positions until after having obtained agreement by the plaintiffs and/or approval by the Court pursuant to the procedures described in paragraph X of the Final Judgment entered by this Court on July 12, 1973. Prior to applying to the Court for permission to proceed with tests for any position, they shall have furnished the following information with respect thereto to plaintiffs and the Court as hereinafter specified:

a. Job Analyses

(1) Before undertaking job analyses for any of the prototypical positions, the Board of Education will furnish to plaintiffs' counsel a full written description by the designated consulting firm of proposed procedures to be followed; this description shall include, among other things, specific information regarding the manner in which the firm will carry out the objectives and requirements of Parts I.1 and

(2) The Board of Education will obtain from the consulting firm and furnish to plaintiffs' counsel on an ongoing basis all summaries, studies and reports generated in the course of conducting the job analyses for any of the prototype positions, including but not limited to the final report and analysis and the program recommended by the firm, pursuant to Part I.2 of the Plan, for the selection and training of persons to conduct subsequent job analyses.

b. Development of Tests and Evaluation Procedures

Not later than six weeks prior to an application for court approval of the holding of Step 1 tests for a prototype position, the Board of Examiners will provide plaintiffs' counsel with

(1) a full and detailed description of each Step 1 test and the Step 2 evaluation procedures therefor, with all data and studies showing the basis for concluding both that the component parts of each step and the licensing process as a whole are valid and job-related; with respect to Step 1 tests, such information may include the full text of actual tests to be given but need not do so if adequate samplings of tests and test questions are provided to indicate specifically how the tests are related both to the job analyses and proposed Step 2 evaluation procedures

(2) a description showing racial and ethnic composition and educational and professional background of the pool of examination assistants designated to administer the Step 1 tests

(3) description of procedures to be followed in selecting panelists for Step 2 evaluations.

2. Promulgation of Results

Defendants shall not promulgate the results of either Step 1 tests or Step 2 evaluations for prototype positions or issue either provisional or permanent licenses based thereon less than 3 weeks after having submitted to plaintiffs and the Court the following information:

a. With respect to Step 1 results only:

(1) Copies of the tests, if not previously furnished, with copies of scoring guidelines, assessment profile format and manual for use of profiles to be furnished to appointing authorities.

b. With respect to Step 1 and Step 2 results:

(1) A report on the race and ethnicity, and educational and professional background of the respective groups of examination assistants who actually administered the examinations and evaluations.

(2) A report on the race and ethnicity (black, Latin American, White) of applicants who applied for, completed, passed and failed the examination or evaluation respectively.

(3) A list of persons who failed the examination or evaluation with reasons for failure of each.

(4) A copy of the notices given to applicants regarding their rights of appeal from examination or evaluation results.

3. Appeals

As soon as appeals from Step 1 tests or Step 2 evaluations are resolved, defendant Board of Examiners shall furnish to plaintiffs' counsel and the Court a report on the race and ethnicity of successful and unsuccessful appellants, respectively.

B. Other Examinations

1. Defendants shall not promulgate the result of Step 1 tests for any non-prototypical position for which no eligible list has previously been established pursuant to this Plan, or issue provisional licenses based thereon, until at least six weeks after having furnished to plaintiffs and the Court the same types of data with respect to the development, administration and results thereof and with respect to development of Step 2 evaluation procedures for such position, required in regard to prototypical examinations; nor shall defendants promulgate the results of Step 2 evaluations for such positions or issue permanent licenses therefor until three weeks after having furnished plaintiffs with respect thereto the same types of data required by Part V.A.2 supra in regard to the results of evaluations for prototypical positions.

2. Immediately following the resolution of appeals from Step 1 tests and Step 2 evaluations, respectively, defendants shall report to plaintiffs' counsel on the race and ethnicity of successful and unsuccessful appellants, respectively.

C. Information Regarding Validation

In addition to any validation studies furnished in compliance with Part V. A and B, defendants shall furnish

to plaintiffs' counsel, as soon as they are developed, the following data required by the Plan:

(a) All validation studies and description of planned or recommended procedures for validating Step 1 tests and/or Step 2 evaluations referred to in Part III of the Plan.

(b) Any other validation studies of any supervisory examination or evaluation performed while these reporting provisions remain in effect.

D. Information on Staff Development

With 3 months from the date of the Court's Order and semi-annually thereafter for as long as these reporting provisions remain in effect, the Board of Examiners shall submit a report on its compliance with the provisions of Part II.F of the Plan.

The defendants shall furnish to Plaintiffs' counsel as they are developed reports of all such studies conducted by themselves or consultants pursuant to Parts I.2 and I.3 of the Plan. In addition, within 6 months after receiving any such report, they shall report further to the Court and plaintiffs' counsel on actions taken to comply with its recommendations.

F. Information Regarding Frequency of Step 1 Examinations

Beginning three months after the establishment of the first list of provisional licensees promulgated pursuant to Part I.C. of the Plan and for the duration of these reporting and monitoring requirements, defendants shall furnish to plaintiffs' counsel a quarterly report on the administration of Step 1 tests for all titles for which

such lists have been promulgated to date, setting forth the numbers of persons who have applied for Step 1 tests for each since promulgation of the list; the date of any subsequent Step 1 examinations held or scheduled and if none, the reason why not; the extent to which each list has decreased in number since promulgation; and other information bearing on defendants' compliance with Part I.C.

G. Other Information

The defendants will provide the plaintiffs' counsel with such other information as is reasonably necessary for them to make a determination regarding compliance with the Court's Orders and/or the validity and job relatedness of any test, and will furnish the information required by Part B.1, supra, at earlier times than those presented, provided that:

(a) plaintiffs' counsel give defendants reasonable written notice of the information required; and

(b) the information requested is relevant to a determination concerning compliance with the Court's Orders.

H. Record Keeping

Defendants shall retain all underlying data and other records, reports, resumes of oral reports and other data bearing on implementation of the Plan and/or other matters covered by this Section for so long as these reporting and monitoring provisions remain in effect. All such records shall be subject to inspection by plaintiffs' attorneys in accordance with the provisions of Part V.G., supra.

I. Protective Orders 382a

Nothing herein shall be deemed to preclude the defendants from seeking appropriate protective orders from the Court with respect to the confidentiality of tests or test questions or the identity of individuals.

J. Duration

Except as otherwise expressly provided herein, these reporting and monitoring provisions shall remain in effect until the expiration of two years after administration of the last new examination for a supervisory position in existence or created by combining positions in existence at the date of the Court's Order confirming this Plan, or 5 years after the announcement of the last prototypical examination, whichever is later.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

- X

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants

70 Civ. 4141
(H.R.T.)

AFFIDAVIT

- X

STATE OF NEW JERSEY)
COUNTY OF HUDSON) ss:

RICHARD S. BARRETT, being duly sworn, deposes and says:

1. I am the Director of the Laboratory of Psychological Studies and of the Applied Psychology Division of Stevens Institute of Technology, Hoboken, New Jersey. I hold a Ph.D. in Industrial Psychology and since 1951, have specialized in research, teaching and consulting work in the fields of testing and fair employment. I have previously submitted affidavits in the above-captioned action and have testified or submitted papers as an expert witness in many fair employment litigations.

2. I submit this affidavit in support of the Plaintiffs' Motion dated January 3, 1975 for an order modifying the Final Judgment of July 12, 1973 herein and approving a Plan for development of a new permanent system for selecting supervisory personnel in the New York City school system.

3. I have read paragraphs IX and X of the July 12, 1973 Final Judgment in this case. I have also read a document entitled "Plan Proposed by the Board of Examiners, Board of Education and the Chancellor, for Licensing Supervisors in the New York City School System" (hereinafter the "Plan") which I am advised was submitted to the Court by the parties on May 24, 1973.

4. Although the Plan, in the words of its first sentence, "outlines a procedure for the development of" new supervisory examinations, it cannot be

deemed to constitute a detailed description of a new licensing system, ready for implementation in accordance with paragraph X of the Final Judgment. At most, the Plan sets forth guidelines for the Boards of Education and Examiners and their consultants in working out such a system. Before an actual selection system following such guidelines could be developed, intensive work would be required to devise specific tests and evaluation procedures; this process would generate substantial data relevant to the validity, job-relatedness and compliance with the Plan of the kind which plaintiffs would be entitled to review prior to implementation.

5. I have read the proposed "Reporting Requirements" included by the Board of Examiners as paragraph V of a Plan submitted with their Motion of December 20, 1974 and the "Reporting and Monitoring Requirements" included in the Plan annexed to plaintiffs' January 3 Motion. In my opinion, the information required by the defendants' "Reporting Requirements" would not afford plaintiffs either the "detailed description of the new selection system" or "all relevant data relating to the new selection system and its development" required by paragraph X of the Final Judgment. Defendants propose only to provide "a description of the scope" of the Step 1 examinations before they are administered. This does not indicate that any information would be furnished regarding either the development of the tests or their actual characteristics. No information at all would be furnished permitting appraisal of the job-relatedness or fairness of the Step 2 evaluation procedures, either before or after they were administered.

6. In my opinion, plaintiffs' proposal in its "Reporting and Monitoring Requirements" for prior submission by defendants of data regarding the development of Step 1 tests and Step 2 evaluations for prototypical positions is no more than necessary to assure that plaintiffs have an adequate description of each test and relevant information bearing on the degree to which developmental procedures complied with the Plan and provisions of law.

7. I have read a proposal by the American Institutes for Research ("AIR") dated August 8, 1974 and titled "Prototype Job Analyses for Three Supervisory Positions Within the New York City School System." On the basis of this docu-

ment I was asked by plaintiffs to assess AIR's qualifications for performing the job analyses specified in the Plan and the appropriateness of their choice for this assignment by the Board of Education. In my opinion, the proposal submitted affords insufficient basis upon which to answer either of these questions.

8. An appropriate proposal for the work of job analyses upon which an informed choice among apparently qualified firms could be made, would include substantial detail not contained in the AIR proposal. Among other things it would provide information on the identity and qualifications of personnel in the firm who would respectively supervise and implement the various tasks involved, the time which would be invested in particular tasks by personnel at different levels, the time to be devoted to oral interviews and consultations and the depth of such inquiries, the procedures for selecting personnel to be interviewed, and the manner in which results of each step in the analysis would be assembled and used. In addition, the proposal would specify procedures and a time schedule for furnishing ongoing reports to the client on the progress ofthe task. The omission of these necessary data from the AIR proposal should, in my opinion, at least have deferred the firm's selection for the job analyses.

Richard S. Barrett

STATE OF NEW JERSEY
COUNTY OF HUDSON

Sworn to before me this 30th
day of December, 1974

Josephine L. Vitale
Notary Public

JOSEPHINE L. VITALE
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 1, 1979

JEANNE R. SILVER
Attorney at Law
20 WEST 40TH STREET
NEW YORK, N. Y. 10018
(212) 354-6100

December 2, 1974

Leonard Bernikow, Esq.
Corporation Counsel
Municipal Building - Room 1643
New York, New York 10007

Re: Chance v. Board of Examiners - Permanent Licensing System

Dear Len:

It has come to the attention of plaintiffs that notwithstanding our urgent request to the contrary (see my letter of November 18), the Board of Education passed Item No. 23 on its November 20 agenda, and authorized its Secretary to retain American Institutes for Research as consultant on the job analyses for the Permanent Licensing Plan. I am writing to reiterate my oral protest to you over the telephone last week and our request that the Secretary withhold any action in this matter pending further commmunications by plaintiffs with the Board and the AIR firm.

In my November 18 letter I pointed out that plaintiffs' consent to the permanent licensing plan was conditioned on selection by the Board of an acceptable consultant and that, in accordance with discussions with you and your client, we had expected an adequate opportunity both to inquire into the credentials of three firms originally under consideration and to consult with the Board about our findings. Instead, after we were denied even the courtesy of a reply to our request for pertinent documents, the Board made an executive session selection of one firm. Only thereafter did we receive the requested copy of that firm's proposal. We scarcely had time to study it and comment before the Board's action in public meeting to select the firm over our specific objection.

We have continued our researches on AIR in the hope that despite the unfortunate circumstances of the firm's selection, our concerns about its probable performance might be dispelled. In fact continued investigations have strengthened our doubts. AIR's work on the new Fire Department examinations required by the Wilson case, in which Elizabeth DuBois is among plaintiffs' counsel, has been very seriously questioned by plaintiffs there. Particularly since the Board's Secretary cited this assignment as one basis for AIR's choice by the Board of Education, this factor

Ex. "C"

alone suggests a reason to give further thought to the firm's competence before entering a contract with it for the crucial stage of prototypical job analyses.

Without endorsing any particular firm at this time, I think I may add that our researches tend to suggest that one of the other firms on the Board's list might be preferable to AIR. Lacking opportunity to read proposals they may have submitted, we are not in a position to make definitive comments, but each of the others which was on the Board's list has received some favorable comments from experts we have consulted and each is believed free from some of the possible potentialities for bias and liminations as to scope of prior work which have been reported or indicated in connection with AIR.

In view of the foregoing, we feel it would be highly questionable, not only in terms of the Board's posture as defendant herein but also as a matter of public policy, for the Board to contract with AIR before specifically considering our objections. Such consideration would be most fruitful if the AIR firm were itself involved and responsible personnel would answer our questions.

I am accordingly making a formal request at this time that in addition to delaying the appointment of AIR, the Board arrange one or more meetings, in which plaintiffs' counsel and experts could discuss AIR's proposal and qualifications with members of the Board and responsible members of AIR. In addition, we would like to discuss the credentials and proposals of other firms which were considered by the Board with a view to seeing whether we can reach agreement on the acceptability of any one of them. In the latter connection, I again reiterate my request for copies of the proposals submitted by Development Dimensions, Inc., Felix Lopez, Inc. and any other firms the Board has had under consideration for the prototypical job analyses.

Sincerely yours,

Elizabeth B. DuBois, Esq.

Jeanne R. Silver
Attorneys for Plaintiffs

JRS/mg

CC: Mr. Harold Siegel

JEANNE R. SILVER
Attorney at Law
20 WEST 40TH STREET
NEW YORK, N. Y. 10018
(212) 354-6100

388a

November 18, 1974

Mr. Harold Siegel
Secretary
The Board of Education of the City of New York
110 Livingston Street
Brooklyn, New York 11201

Re: Chance v. Board of Examiners

Dear Harold:

I have just received the Board of Education's agenda for its November 20 meeting and am shocked to discover that despite my repeated objections in telephone conversations with you and Leonard Bernikow over the last two weeks, the Board plans to go ahead with a unilateral decision to retain American Institutes for Research (AIR) to do prototype job analyses for the permanent new licensing system.

Last summer when the parties to this action submitted the proposed licensing system plan to the Court as a substantially agreed-upon document, we made clear that plaintiffs' concurrence was conditioned upon resolution of three outstanding matters. One was selection of a consulting firm acceptable to plaintiffs to perform the prototype job analyses. To facilitate determination of this issue, you furnished us with the names of three firms under consideration, authorized us to contact them; it was also indicated that any new proposals would be made available to us.

Although plaintiffs made every effort to expedite the agreed-upon procedure, the Board has not been cooperative. For example, in August our inquiries revealed that one or more of the firms, including AIR were about to submit a proposal. On August 16, I wrote to the attached letter requesting an opportunity to examine those documents when they were submitted.

I never received an answer to my August 16 letter. A few weeks ago, I called Mr. Bernikow to inquire about this lack and to discuss the status of the matter under the circumstances. He said he was unable to report to me pending conversation with his client. Thereafter, on November 8 you telephoned me that the Board had selected AIR and would have the matter on its November 20 agenda.

EXHIBIT C-3

Plaintiffs consider the Board's course of action in this matter to be a serious breach of our understanding, raising questions of good faith on its part. More importantly, we are concerned about the substantive choice of AIR. The proposal which you sent me on November 8 does not dispel doubts which we had developed based on our own research about this firm's qualifications to perform the analyses. It is possible that these doubts might be set to rest if there were an opportunity for further inquiry and comparison between AIR and other firms in the light of its and their proposals. However, we cannot on the basis of present information conclude that AIR is qualified either to address the substantive problem of rational job analyses for school supervisory positions or to proceed with the sensitivity to racial, ethnic and community issues required in the circumstances of this case.

I am accordingly writing to reiterate our stremuous objection to inclusion of Item 23 on the Board's agenda for Wednesday. It would certainly be unfortunate to jeopardize the agreement on a permanent licensing system for which we have all struggled so long. We believe it is unnecessary to do that, yet unless the Resolution is voted down or laid over, plaintiffs' conditional consent to the Plan will have to be deemed withdrawn.

Very truly yours,

Elizabeth B. DuBois, Esq.

Jeanne R. Silver, Esq.

JRS/mg

CC: Leonard Bernikow, Esq.
Howard Jacobson, Esq.

JEANNE R. SILVER
Attorney at Law
20 WEST 40TH STREET
NEW YORK, N. Y. 10018
(212) 354-6100

August 16, 1974

Leonard Bernikow, Esq.
Corporation Counsel Office
Municipal Building
New York, New York 10007

Re: Chance et al. v. Board of Examiners, et al.

Dear Len:

In the last meeting between plaintiffs' counsel and Board of Education representatives regarding the permanent licensing system, Harold Siegel furnished us with the names of three consulting firms which the Board is considering for performance of prototypical job analyses pursuant to Part I of the draft Permanent Licensing Plan. It was agreed that plaintiffs' representatives would make inquiries to determine whether any or all of these firms are acceptable to us and that in that connection we could communicate directly with your contact persons at each firm. Recently, upon communicating with one of the individuals you had mentioned, we were advised that his firm would be submitting a proposal for conduct of the analyses at the end of that week.

Plaintiffs' counsel were not aware that the firms Mr. Siegel mentioned had been asked to submit proposals pending their possible selection for the job. It seems clear that examination of such proposals would facilitate our assessment of the consultants' qualifications, possibly obviating long, expensive trips to interview them, and certainly hastening the end of our investigation.

In view of the proposals' clear relevance for this purpose, we can imagine no serious consideration which would prevent your making them available to us and our consultants in the matter on a confidential basis. Needless to say, our use of them would be solely with a view to determining whether the firms are agreeable to us.

EXHIBIT C-5

Accordingly, I am writing to request that any proposals submitted by Development Dimensions, Inc.; Felix Lopez and Associates; American Institutes for Research, or any other firms the Board may be considering for the job analyses be furnished to us forthwith or as soon as they are received. This request should be treated as urgent in view of our mutual concern that work on the details of a permanent licensing plan begin as soon as possible.

Sincerely,

Jeanne R. Silver

JRS/mg

CC: ıl Z. Cohen, Esq.
ızabeth B. DuBois, Esq.
ofessor George Cooper

New York University

School of Education
Center for Educational Research and Field Services

51 Press Building
Washington Square
New York, N.Y. 10003
Telephone: (212) 598-2893, 3425

392a

13 December, 1974

Jeanne R. Silver
Attorney at Law
20 West 40 Street
New York, New York 10018

Dear Ms. Silver:

This letter is to confirm our discussion over the telephone yesterday regarding your request for information about our proposal submitted to the New York City Board of Examiners.

I contacted the Board's attorney, Mr. Jacobson, and Mr. Murray Rockowitz, Board Chairman, as you suggested in your letter. Both requested that we not release to you our proposal to the Board. We will respect that request since it is the normal practice to treat proposals submitted to all our clients as confidential.

As you would expect, we have no intention of challenging the Board's choice of consultant. Even if you were to determine after investigation of all consultants that New York University were superior, we could not accept such a contested award. It would be difficult to service properly an unwilling client.

We respect your concerns and your clients' needs. At this point, we do not see how we can make a positive contribution with any information that we could provide.

I regret I cannot respond in a more positive way to your requests. Wishing you well,

Sincerely,

James Richards
Acting Assistant Dean

EXHIBIT D

Copy to Dean Daniel E. Griffiths

Affidavit of Saul Z. Cohen, with
exhibit, sworn to January 13, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

BOSTON M. CHANCE, Et al., :

Plaintiffs, :

-against- :

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., :

Defendants. :

- -X

75 JAN 14 AM 11 55

70 Civ. 4141
(#.R.T.)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAUL Z. COHEN, being duly sworn, deposes and says:

1. I am an attorney and a member of the firm of Kaye, Scholer, Fierman, Hays & Handler, counsel for defendant Board of Examiners herein. I submit this affidavit in opposition to plaintiffs' motions with regard to the Plan for the selection of supervisors within the New York City School System, and in further support of defendants' motion to modify the Final Judgment herein in order to permit the development and administration of examinations for supervisory positions in accordance with the Plan submitted by defendants.

2. Plaintiffs' papers make clear that the parties are in agreement on a Plan for developing and administering supervisory examinations which will satisfy the requirements of state and federal law. Plaintiffs, however, ask this Court to give them a voice in the selection of a consultant (called for by the Plan) which

was never agreed upon and not required. Further, plaintiffs ask this court, through proposed reporting procedures, to give them a continuing, ongoing, role in the development and administration of tests which, again, was neither agreed upon nor required by any legal standard. Adoption of plaintiffs' proposals would doom the Plan. The process of "negotiation" would be endless and the examination requirement of the New York State Constitution would be effectively abrogated.

The Choice of Consultants

3. Not only did defendants never agree that the choice of consultants was to be by mutual agreement, the defendants expressly and categorically rejected any such concept and specifically insisted that the designation of a consultant remain the unilateral responsibility of each Board (i.e., Board of Examiners with respect to validation, and the Board of Education with respect to job analysis.

4. It is precisely because of this firm, fixed and unyielding position by defendants that the Plan submitted to this court on May 24, 1974 contains blanks where the name of the consultant would appear. (See pp. 6 and 22 of Plan as submitted May 24, 1974.) My recollection on this point is crystal clear, viz.: The plaintiffs wanted consultants chosen by agreement. Defendants rejected this proposal. Plaintiffs next proposed arbitration, i.e., the consultants would be selected by a panel with an impartial third party to break a deadlock. Again, the proposal was categorically rejected by defendants.

Defendants insisted on the right to designate on their own. Mr. Monserrat, a member of the Board of Education, specifically said the Boards could not and would not delegate this responsibility. He asked why plaintiffs were so sure they would object to consultants selected by defendants? Prof. Cooper, a counsel for plaintiffs, opined that if defendants picked known, reputable, consultants there would, in all likelihood, be no disagreement. Whereupon, it is my recollection that I suggested we submit the Plan with blanks. When defendants decided on a consultant, they would inform plaintiffs' counsel. Maybe there would be no disagreement - in which case the parties need only fill in the blanks. If plaintiffs disagreed, they were free to withdraw their endorsement of the Plan. That is precisely how it was left.

It is now evident that although plaintiffs do not wish to withdraw their approval of the jointly proposed Plan, they wish to foist upon defendants the very procedure for selecting consultants which defendants expressly rejected.

5. There is no constitutional or other legal principle which gives plaintiffs the right to participate in the selection of a consultant called for by the Plan. Nor is there any such principle which would require this Court to substitute its judgment in this matter for that of the authorized governmental body. The use of a consultant was not mandated by any constitutional principle. Defendants could have decided to develop the examinations

themselves. Having agreed to utilize a consultant, they reserved the right to make the choice. They do not intend to negotiate with plaintiffs concerning this matter and have refused efforts by plaintiffs to draw them into such negotiations.

6. The record should reflect the fact that Development Dimensions, Inc., the consultant selected by the Board of Examiners with regard to validation of the new examinations is a highly respected agency which has wide experience in such work. Its clients include numerous large private corporations as well as governmental agencies. Attached hereto as Exhibit A is an information sheet with regard to Development Dimensions, Inc. which describes that firm and lists some of its other clients.

7. Finally, this court should be aware of the difficulties which would ensue if defendants are forced to develop and administer examinations using consultants which are not of their choosing. This point is made quite clear in Exhibit D to plaintiffs' own motion papers, a copy of a letter from Acting Assistant Dean James Richards of the New York University Center for Educational Research and Field Services ("N.Y.U.") to plaintiffs' counsel dated December 13, 1974. N.Y.U. was one of the agencies which submitted proposals to the Board of Examiners to act as consultant regarding validation of new examinations. The Board of Examiners rejected N.Y.U.'s proposal and chose Development Dimensions, Inc. instead. Dean Richard's

letter clearly indicates that N.Y.U. would not even be willing to serve as a consultant now since it would not have been willingly chosen by the Board of Examiners. Thus, the letter states:

> "As would expect, we have no intention of challenging the Board's choice of consultant. Even if you were to determine after investigation of all consultants that New York University were superior, we could not accept such a contested award. It would be difficult to service properly an unwilling client."

The Issue of Reporting Requirements.

8. Plaintiffs' primary contention with regard to the reporting requirements set forth in the Plan submitted by defendants is that those requirements are inconsistent with the terms of the Final Judgment herein entered July 12, 1973. Plaintiffs urge that, although defendants have made their motion to permit new examinations pursuant to paragraph IX of the Final Judgment, defendants' proposed reporting requirements fail to comply with the requirements of paragraph X of the Judgment, under which defendants should have moved. This contention is based upon an erroneous reading of the Final Judgment and totally ignores the proceedings herein between the time the Stipulation of Settlement was initially submitted to the court in early April of 1973 and the Final Judgment was entered in July of 1973.

9. The Stipulation of Settlement herein was submitted to the court on or about April 2, 1973. It provided for the inclusion in a subsequent final judgment of language essentially similar to that presently contained in paragraph

X of the Final Judgment.* However, defendant Board of Education objected to the Stipulation and refused to execute it because, among other things, there was no time limit within which plenary examinations for supervisors would be substituted for the interim on-the-job evaluations which the Stipulation contemplated.

10. The Board of Examiners then indicated that it would be willing to insert a provision into the Stipulation putting a time limit on the interim evaluations and plaintiffs and the Board of Examiners agreed to alternative provisions. On May 21,1973, this court rendered a decision which approved the Stipulation, subject to a later hearing required by Rule 23 of the Federal Rules of Civil Procedure, so long as it was amended to add a new provision reading:

> "I. Within six (6) months of the effective date of the judgment entered pursuant to Paragraph IV hereof, the parties shall either agree upon a plan for a permanent system for the selection of supervisors within the New York City School System, or any party shall be free to apply to the Court for modification of the judgment."

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*Paragraph II(I) of the Stipulation provides that the consent judgment to be entered thereafter must contain the following provision:

> "I. Any party may, upon at least 3 weeks' written notice to counsel for all other parties, apply for modification of the Judgment to permit the implementation of a new system for the selection of supervisors in the New York City School System, provided that a detailed description of the new selection system, together with all relevant data relating to the new selection system and its development, have first been made available to all other parties and an opportunity afforded to such other parties to review such data and to confer with the applicant with a view to resolving any differences that may arise and reaching agreement upon new examination procedures that are to be the subject of such application."

(This provision is now paragraph IX of the Judgment, pursuant to which defendants have moved.) Moreover, since the Board of Examiners had insisted upon the right to seek modification of the judgment prior to six months after the entry of a judgment if it quickly became evident that no agreement could be reached on a plan for new examinations, the May 21, 1973 decision also required the addition of a "prefatory phrase" to the former paragraph II (I) of the Stipulation (see above), providing that notwithstanding the new provision, a party could still apply for modification earlier, upon three weeks' notice.

11. Thus, both paragraphs IX and X of the Final Judgment were intended to permit the modification of the Final Judgment so that plenary examinations could be administered. The distinction between those paragraphs which plaintiffs seek to draw is unwarranted. Paragraph X was clearly intended to deal with a situation where there has not been an agreement between the parties on a detailed Plan for new examinations. Since such an agreement has been reached here, paragraph X is clearly inapposite to defendants' motion to implement the agreed upon Plan.

12. In any event, defendants' motion complies with paragraph X since the Plan itself contains "a detailed description of the new selection system, together with all relevant data relating to the new selection system and its development . . ." Of course, plaintiffs helped to "describe" and "develop" the system. Plaintiffs participated

in the entire process of negotiations, task force meetings and consultations with interested persons, including representatives of the 32 community school boards and various "experts". And plaintiffs have approved the system. Thus, plaintiffs already have the description and relevant data required by paragraph X of the Final Judgment.*

13. Finally, it is quite clear from an examination of plaintiffs' proposed "reporting and monitoring requirements" (see pages 23-29 of Exhibit A to their motion papers) that, in view of the minutia which plaintiffs wish to receive and in view of the fact that the administration of all prototype examinations and the promulgation of results for both prototype and nonprototype examinations shall be subject to plaintiffs' approval, the implementation of the Plan will become hopelessly bogged down first in negotiations and, inevitably, in endless litigation.

14. Plaintiffs seek to obtain actual prototype examinations or "adequate samplings of test and test questions" (see VA1b (1) of plaintiffs' proposed Plan) in advance of the giving of those examinations and apparently wish to receive almost every piece of paper generated by defendants or their consultants during the development and administration

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* Paragraph X of the Final Judgment requires a description and relevant data with regard to the "system", not with regard to the specific examinations which are to be developed pursuant to that system. What plaintiffs seek through their "reporting and monitoring requirements" is the detailed minutia which will result from defendants' creation and administration of actual examinations.

of examinations, the promulgation of results and validation of those examinations. Thus, for example, plaintiffs wish to receive "on an ongoing basis all summaries, studies and reports generated in the course of conducting the job analyses" (see paragraph VA1a(2) of plaintiffs' proposed Plan). In addition, plaintiffs wish the entire procedure to be subject to their constant approval. Thus, for example, prototype examinations may not be administered "until after [defendants] hav[e] obtained agreement by the plaintiffs and/or approval by the Court" (see paragraph VA1 of plaintiffs' proposed Plan).

15. Plaintiffs have built themselves into the educational process as partners with the governmental agencies which have been duly authorized by statute to operate the New York City School System and develop and administer examinations for supervisors in it. Plaintiffs' proposals would mean that the new examinations contemplated by the Plan will not be administered for many years. In the meantime, of course, the "interim system" would continue.* This procedure

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*When the Court of Appeals for the Second Circuit upheld the settlement of this action in April 1974, Chance v. Board of Examiners, 496 F. 2d 820, 825 (1974), it noted:

> ". . .Were the litigation to remain indefinitely in its unfinished state, the propriety of continuing to allow permanent appointments would be another matter. The interim tail would then be wagging the dog and the incentive for plaintiffs' class to obtain a permanent non-discriminatory testing system would diminish considerably and perhaps disappear. . . Allowing another lengthy period of time to go by, thus creating further eligibles for permanent appointment as an 'interim' measure, would approach an abuse of discretion."

gives defendants more than they could have achieved had the won this case after litigation on the merits.

16. We have previously noted the relationship between plaintiffs' present counsel and the Public Education Association. (See e.g., the affidavit of Murray Rockowitz, sworn to December 16, 1974, which was submitted in opposition to plaintiffs' contempt-modification motion, paragraphs 14-15). The publicly-stated objective of the Public Education Association is to eliminate examinations for supervisory personnel in the New York City School System. Plaintiffs' proposed reporting requirements which were drafted by counsel for Public Education Association, are an effective method of achieving that end.

17. Certainly, plaintiffs are entitled to information, for a limited period of time*, with regard to what defendants have done in developing and administering actual examinations pursuant to the Plan. Defendants' Plan includes a reporting provision to achieve that objective. But neither the Final Judgment herein nor any principle of law should make plaintiffs' counsel a state educational agency. The New York Constitution and New York Education Law impose on the Board of Examiners the responsibility for

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* Plaintiffs propose that their reporting requirements continue for at least five years, and probably longer. Since there are numerous supervisory positions in the New York City School System, for some of which examinations are rarely administered, the "last new examination" may not be administered for years. (See paragraph V(J) of their proposed Plan). Thus, plaintiffs wish to continue their role for a period which in all probability will be well in excess of five years.

developing and administering examinations. The defendant Board of Examiners has gone a long way in seeking to revise its procedures and programs to meet constitutional requirements. It cannot be put in a position where it can only function with approval of plaintiffs or where its every action will be the subject of litigation. We cannot believe that this court wishes to become the arbitrary superintendent of the staff developing supervisory examinations.

Saul Z. Cohen

SWORN to before me this
13th day of January, 1975.

Notary Public

CONSTANCE VAIBO
NOTARY PUBLIC State of New York
No. 31-[illegible]
Qualified in [illegible] County
Commission Expires March 30, 1976

EXHIBIT A - Information sheet with regard to Development Dimensions, Inc.

(Printed at pp. 786a-787a)

Affidavits of Leonard Bernikow (plus exhibit) and Harold Siegal, sworn to January 14, 1975

NITED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

OSTON M. CHANCE, et al., :

Plaintiffs, :

-against- : 70 Civ. 4141 (H.R.T.)

HE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., : AFFIDAVIT

Defendants. :

- - - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

LEONARD BERNIKOW, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of ADRIAN P. BURKE, Corporation Counsel, the attorney for the defendants Board of Education and Chancellor herein. I submit this affidavit in opposition to plaintiffs' motion with regard to the plan for the selection of supervisors within the New York City School System, and the selection of consultants, and in further support of defendants' motion to modify the Final Judgment herein in order to permit the development and administration of examinations for supervisory positions in accordance with the Plan submitted by defendants.

2. I have reviewed the affidavit of SAUL Z. Cohen, the attorney for the defendant Board of Examiners, sworn to the 13th day of January, 1975, submitted on the above-mentioned motions, and I believe it adequately and sufficiently sets forth the position of the Board of Education and the Chancellor.

3. In addition, we wish to point out that the Board of Education has selected the American Institutes for Research ("AIR") for the development of job analyses. AIR is a responsible and experienced agency. Attached hereto as Exhibit "A" is a copy of the prototype job analyses prepared by AIR. The Exhibit also contains some background material concerning AIR which included its related experience.

Leonard Bernikow

Sworn to before me this

14th day of January, 1975

JULIUS KAPLAN
Commissioner of Deeds
City of New York 2-1760
Certificate filed in Kings County
Commission Expires May 1, 1978

Julius Kaplan

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS and THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141
(H.R.T.)

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

HAROLD SIEGEL, being duly sworn, deposes and says:

1. I am the Secretary of the Board of Education of the City of New York and I submit this affidavit in support of the defendants' motion.

2. I have read the affidavit of Saul Z. Cohen, sworn to the 13th day of January 1975. I have read paragraphs 3 and 4 of Mr. Cohen's affidavit. Insofar as those paragraphs referred to the position of the Board of Education and described what happened, they are accurate. I was present at the meetings when these matters were discussed. When the parties were discussing the proposed order there were several matters that the representatives of the Board of Education, Mr. Monserrat and myself, felt had to be discussed with the full Board. The matter of the consultant for the job analyses was one of these. Subsequently the position of the Board was clearly explained to the counsel for the plaintiffs. The Board would not share the decision making process but would give an opportunity to the

plaintiffs to react to the consultant and the proposal. This was done.

3. About the middle of August 1974 subsequent to a meeting of the parties, Mrs. Renee Roberts, then Counsel to the Board of Education, provided plaintiffs' counsel with the names of the consultant firms under consideration.

4. Mrs. Roberts left the Board of Education and subsequently on or about November 1, 1974, I was asked by the President of the Board of Education to follow up on this matter. I then checked to determine whether the three proposals of the consultant firms were still operative. On or about November 8, 1974 I was advised that American Institutes for Research ("AIR") was the consultant recommended by Mr.Monserrat, acting as a sub-committee of the Board.

5. On the same day I immediately called Mrs. Frankl, counsel for the plaintiffs, to advise her that a resolution would be calendared for the next business meeting of the Board of Education, at which time the Board would consider the approval of this consultant firm. I suggested to her that if she had any comment with respect either to the firm or to the proposal which was being sent to her, the Board would be interested in hearing this.

6. The next I heard from Mrs. Frankl was her letter dated November 20, 1974 which is attached to the plaintiffs' motion papers.

7. Although Mrs. Frankl did not appear at the public meeting, Mr. David Seeley, Director of the Public Education

Association, with which Mrs. Frankl is associated, did appear to address the Board. We are not clear whether he was acting as surrogate for Mrs. Frankl. The main thrust of his statement was that there had not been what he called "adequate consultation."

Harold Siegel

Sworn to before me this
14th day of January, 1975

JULIUS KAPLAN
Commissioner of Deeds
City of New York 2-1760
Certificate filed in Kings County
Commission Expires May 1, 1975

Julius Kaplan

AMERICAN INSTITUTES FOR RESEARCH
WASHINGTON OFFICES
AIR 411a
3301 New Mexico Avenue, N.W., Washington, D. C. 20016
Telephone: (202) 686-6800

P-3977-1-21

PROTOTYPE JOB ANALYSES OF THREE SUPERVISORY POSITIONS WITHIN THE NEW YORK CITY SCHOOL SYSTEM

In response to letter dated:
July 12, 1974

Submitted to:

Board of Education of the
City of New York
110 Livingston Street
Brooklyn, New York 11201

Attn: Harold Siegel, Secretary

Submitted by:

Gary B. Brumback, Ph.D.
Senior Research Scientist

8 August 1974

EXHIBI "A"

ADMINISTRATIVE INFORMATION

The American Institutes for Research is a nonprofit, scientific and educational organization incorporated under the laws of the Commonwealth of Pennsylvania in 1946. The status (not a private foundation) of AIR is described in Section 509 (a) (2) of the Internal Revenue Code and has been officially recognized as such in a letter from IRS dated 13 December 1972.

The primary person to contact with regard to this proposal and its staffing:

Gary B. Brumback, Ph.D.
Senior Research Scientist
Human Resources Research Group
American Institutes for Research
3301 New Mexico Avenue, N.W.
Washington, D.C. 20016

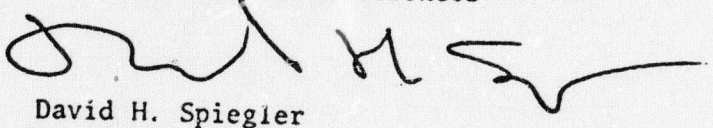
Telephone: (202) 686-6800

Matters of contract negotiations such as standard accounting procedures, audits, company policies and benefits, indirect cost composition and rate, payment schedules, fee, and contract award notification and contract documents for signature should be communicated directly to:

David H. Spiegler, Director
Management Systems Office
American Institutes for Research
3301 New Mexico Avenue, N.W.
Washington, D.C. 20016

Telephone: (202) 686-6880

Respectfully submitted,
AMERICAN INSTITUTES FOR RESEARCH
in the Behavioral Sciences



David H. Spiegler
Assistant Secretary/Treasurer
Washington Office

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INTRODUCTION

This proposal presents the technical approach that would be used, the time schedule that would be followed, and the professional staff that would be drawn upon by the American Institutes for Research (A.I.R.) in order to (1) analyze three supervisory positions within the New York City School System in such a way as to constitute prototypes for future analyses of other positions, (2) review existing job titles for the appropriateness of combining titles and/or creating new titles, and (3) recommend a selection and training program for job analysts.

As an immediate result of the work proposed here, the Board of Examiners would have the job analysis data that are necessary and sufficient for the development of job-related examinations for licensing supervisors in each of three titles; Principal of an Elementary School, Assistant Principal (Elementary, Intermediate, Junior High School), and Assistant Principal-Supervisor of a High School Department. The proposed work would also provide the Board of Education with the required and continuing capability of having other positions within the school system subsequently analyzed according to model job analysis procedures and by properly selected and trained analysts so that job-related examinations can be developed for those other positions.

BACKGROUND

We are witnessing an end to the time when an examination could be constructed with only a casually acquired, sketchy understanding of a job's qualification requirements. Job analysis is becoming an increasingly crucial factor in the development and later defense of examinations. We interpret the recent draft of the Uniform Guidelines on Employee Selection Procedures of the Equal Employment Opportunity Coordinating Council to mean that unless a procedure, such as a licensing examination, can be demonstrated to be job-related and valid, it is much more likely to be viewed as an unlawful instrument; it may not ensure that licensure depends only on "merit and fitness"; and, it will not be in conformance with the Standards set forth in these guidelines.[1]

The concept of job-relatedness is an emerging one. According to the EEOC, a test, or examination, is job-related

> if it samples knowledges, abilities, skills, or other characteristics shown through a careful job analysis to be necessary or important for successful performance of a job.[2]

The EEOC does not view job-relatedness and validity as equivalent. This same view has been expounded by Robert Guion in his 1973 presidential address to the Division of Industrial and Organizational Psychology and in a subsequent journal article.[3] He points out, for example, that a test can have criterion-related validity and not be job relevant if the criterion measure is not a valid index of overall job performance.

Although examination development and validation are the responsibilities of the Board of Examiners, whereas this proposal is in response to an invitation from the Board of Education which is responsible for job analyses, the three functions are obviously interdependent and all the more so given the dual need for both a job-related and valid examination. It follows, therefore, that one of the factors to consider in proposing a model job analysis system is its utility for all three of the functions. Other factors being equal, a job analysis system which both identifies critical job performance requirements and is a fecund source of ideas and materials for examination content and criterion measures would have the greatest overall utility.

APPROACH

We have concluded from our assessment of the state-of-the-art in job analysis methodology, and from our own research and consulting experiences, that it is inadvisable to rely upon a single method pursuant to the development of a job-related and valid examination. We recently completed the first year of a three-year project to develop a written test development and validation model for the Department of Personnel of the City of New York. Three occupational titles in the

competitive civil service system were chosen as research vehicles for the project, and five job analysis methods were tried and evaluated according to 13 evaluation factors. We found that no one method either excelled on all 13 factors or was inferior in all of them. Furthermore, we concluded that a single method should not be expected to be either robust or precise enough to justify its sole use if a legal challenge is anticipated.

We are consequently proposing here an approach which combines three methods into an integrated multimethod job analysis prototype and which is designed to serve well the needs of both the Board of Education and the Board of Examiners. The three methods are the well known critical incident technique, the job inventory questionnaire, and on-site observations. As we shall discuss below, the third method constitutes a modification of the work sampling procedures of obtaining incumbent and observer logs that are proposed by the two Boards and the Chancellor in their plan for licensing school supervisors. While our multimethod approach is at variance with that plan, we note that it would allow for the contractor to develop and prepare the procedures as outlined in the plan "and/or such other procedures as the firm deems appropriate."[4, 5]

The critical incident technique is essentially a systematic way of collecting either direct or recalled observations of effective and ineffective incidents of job performance.[6] As a job analysis technique, it determines the critical requirements of the job. It can also provide, based on the critical incident data collected, explicit rationales for test development, realistic and job relevant problem materials for examination components, and behaviorally descriptive standards for criterion performance rating scales.[7, 8, 9] There is considerable flexibility in how critical incidents are collected, but for the approach proposed here, small group interviews would be the primary mechanism to be supplemented by mail-out questionnaire, if necessary.

The job inventory is a standardized and self-administered checklist questionnaire. The checklist contains task descriptions, and respondents (usually incumbents) rate them on one or more dimensions such as relative amount of time spent on the tasks, their relative importance

to the accomplishment of job objectives, etc. The U.S. Air Force pioneered this method after concluding that interviews, observation-interviews, technical conferences and open-ended questionnaires had too many shortcomings.[10] The Air Force has refined the technique through numerous research studies, and it has had numerous applications elsewhere.[11, 12]

The third method proposed here, on-site observations, would not require incumbents to maintain diaries, but observers would record their observations of on-the-job behavior onto a behavioral checklist derived from the critical incident data that would have been collected earlier. Further, the number of on-site observations would be minimal, no more than necessary to assure face validity and double check uncertain findings, if any, from the two other methods.

We have not adopted the plan's work sampling methodology, per se, because we think the approach prepared here is more technically satisfactory, more economical and productive, and more ideally suited as a prototype system. The large number of incumbents and visits which would be required to ensure a representative sample of observable behaviors makes work sampling time consuming and disruptive. As a prototype, it would require for future analysis a cadre of persons trained in sampling, observational and recording skills. Moreover, it is not the most satisfactory way to determine what job knowledge and judgmental skills are required for successful performance. While the amount of time spent on each observed task could certainly be recorded by observers, they would be unable to "indicate the relative importance of the described behavior in terms of effective performance."[13] Also, sufficiently accurate estimates of the relative amount of time spent on different tasks can be obtained more economically by the job inventory questionnaire technique.[14] Finally, the plan's methodology has much less overall functional utility.

We have organized our approach into 12 project tasks. Most are interdependent and have been sequenced so that the output from a preceding task flows as input into the following task. The tasks are presented below and specify how the proposed methods described above would be implemented, as well as how the other project objectives would be accomplished.

Task 1. Orientation and First Work Session

An initial meeting following go-ahead would be held between A.I.R. project personnel and Board of Education representatives to review the overall approach and its implementation, provide A.I.R. with an overview of the school system, structure, function and distribution of supervisory positions, and to establish channels of communication and points of coordination. Immediately after this introductory meeting, a more intensive, small group work session should be held to develop a preliminary list of major functions carried out by each of the three positions and to discuss any project-relevant informational materials available to A.I.R. for subsequent review.

Task 2. Collection of Critical Incident Data

Critical incident data would be gathered by a group administered questionnaire. Individuals who are very familiar with supervisory responsibilities and performance, such as supervisors, incumbents, faculty and staff specialists, would be covered in a series of groups. The exact number of groups, their composition or size cannot be predetermined here, but the total number of school personnel involved need not be large.[15] This is because the functional representativeness and not the sheer volume of critical incidents is the determining factor. Moreover, if the first one or two groups is highly resourceful, there may be no need for additional groups.[16]

An A.I.R. project member would preside over the groups and make introductory remarks, distribute questionnaire, give instructions and answer any questions. The instructions would emphasize the need for functional representativeness of the critical incidents and would be accompanied by a list of the major functional areas identified in the previous project task. Group members would then individually complete and return their questionnaires by the end of the meetings.

To complete the questionnaire, the individual would describe as many critical incidents as could be recalled per function. Four questions would be asked about each incident:

- Which of the positions and functions were involved?
- What were the circumstances leading up to the incident?
- What was the consequence?
- What job knowledge, skills, personal qualities or lack thereof appeared to be responsible for the incident?

Task 3. Construction and Review of Job Inventories

The critical incident data, existing job specifications and any other related informational materials would be reviewed in order to construct a preliminary checklist of tasks for each of the three positions. The preliminary checklists would then be reviewed by a small number of job experts for accuracy and completeness. Revised checklists would then be put into job inventory questionnaires. Each inventory would comprise a task checklist, scales for rating both the relative amount of time spent on each performed task and its relative importance, and a section for identifying job knowledges required to perform the tasks.

Task 4. Administration of Job Inventories

A job inventory questionnaire would be mailed to approximately 50 incumbents in each of the three positions. It would be neither necessary nor really appropriate for supervisors to review or complete job inventories, since incumbents should be regarded as the authoritative source of job inventory data. This is because supervisors do not have sufficiently precise knowledge of differences among tasks in time spent or in other dimensions; moreover, incumbents do not tend to exaggerate their jobs when completing an inventory questionnaire.[17]

Task 5. Analysis of Critical Incident and Job Inventory Data

The data would be analyzed within and across each of the three positions to determine the unique and common critical requirements or elements. An analysis of the critical incidents would identify the employee characteristics (task behaviors, knowledges, skills, abilities and personal qualities) required for effective or successful performance. The checklist data from the inventory would be analyzed to determine

the criticality of each task.[18] The job knowledge requirements mentioned by incumbents, especially for the critical tasks would be studied.

Task 6. Construction and Use of Observation Checklist

A checklist for recording observations of critical task behaviors would be constructed based on the data from project tasks 5-6. A small number of on-site observations of incumbents at work would be conducted by A.I.R. project personnel in tandem with appropriate school personnel. There would be a pair of observers making independent observations of each incumbent observed. The observations would be recorded on the observation checklist. The number and duration of observations would be governed by several considerations, one of which, mentioned above, would be whether the need exists to double check any uncertainties about the findings from project task 5 (the Board may have other considerations to suggest).

Task 7. Special Interviews

The Chancellor, Community Superintendent, Community School Boards and/or Parent Associations would be interviewed by A.I.R. project personnel to ascertain their perceptions of the three positions. Interviewers would not be apprised of our accumulated results, since their own, independent opinions are to be consulted.

Task 8. Review of Pertinent Research Literature

Given a careful, thorough job analysis for a specific, possibly unique school system, there is limited need for a review of the pertinent job analysis literature, and the main value of reviewing the selection research literature is in discovering negative findings definitely not worth repeating.

Task 9. Synthesis of Results

The results from project tasks 5-8 would be synthesized into a final set of three job analyses and a documentation of the common job elements identified. The synthesis would include an integration of the critical tasks from the inventory data with the critical task behaviors from the critical incident and observation checklist data. Each job

analysis would provide the necessary and sufficient information to guide the subsequent preparation of job-related and valid examinations of detailed job descriptions.

Task 10. Review of Results

The job analyses and documentation from project task 9 would be submitted to the Board of Education for the reviews designated in its plan (pages 4-5).

Task 11. Review of Existing Job Titles

A.I.R. would review existing job titles and make recommendations where needed for the combination of titles and/or the creation of new titles.

Task 12. Job Analyst Program Recommendations

One of the numerous advantages of the critical incident technique and the job inventory questionnaire technique is that they require less training than some of the other job analysis methods we have studied. To be sure, some training is necessary and some persons would make better analysts than others. We would, therefore, make recommendations as to the specific content and methods of training and the qualities of individuals to be trained which we believe to be necessary to ensure an effective, ongoing job analysis program for the school system.

Project Deliverables

Deliverables would consist of the following: three job analyses and documentation of common elements, recommendations regarding titles, recommendations regarding job analyst program, all booklets and inventories, all observation and interview records, and all intermediate data analyses.

REFERENCES AND FOOTNOTES

1. EEOC Discussion Draft of August 23, 1973.

2. Op cit, p. 5.

3. Guion, R.M. Open a new window. Validities and values in psychological measurement. American Psychologist, 1974, 29 (May), 287-296.

4. Plan proposed by the Board of Examiners, Board of Education and the Chancellor for Licensing Supervisors in the New York City School System. p. 6.

5. A.I.R. would be willing to submit either one of two alternative proposals: (a) to design and conduct a study to compare our multimethod approach with the plan's approach on their suitability for a model system; or, (b) to conduct the three job analyses according to the plan.

6. Flanagan, J.C. The critical incident technique. Psychological Bulletin, 1954, 51, 327-358.

7. Flanagan, J.C. Use of comprehensive rationales. Educational and Psychological Measurement, 1951, 11, 151-155.

8. The technique was used by A.I.R., for example, to prepare rationales and item content for a licensing examination.

9. See, e.g., Dunnette, M.D. Personnel selection and placement. Belmont, California: Wadsworth, 1966.

10. Rupe, J.C. Research into basic methods and technqiues of Air Force job analysis - IV. AFPTRC-TN-56-51. Lackland Air Force Base, Texas: Air Force Personnel and Training Research Center, April 1956.

11. Christal, R.E. (Chm.) Collecting, analyzing and reporting information describing jobs and occupations. Symposium presented at the meeting of the American Psychological Association, Washington, D.C. September, 1969.

12. See, e.g., Brumback, G.B. & Vincent, J.W. Factor analysis of work-performed data for a sample of administrative, professional and scientific positions. Personnel Psychology, 1970, 23, 101-107.

13. Op cit, p. 3.

14. Research findings suggest that incumbents' estimates of how their own time is spent do not differ enough from the more costly and cumbersome work sampling to warrant its use (see, e.g., Carrol, S.J., Jr. & Taylor, W.H., Jr. Validity of estimates by clerical personnel of job time proportions. Journal of Applied Psychology, 1969, 53, 164-166.)

15. Group composition should be representative of the relevant strata of schools such as size and socioeconomic level.

16. Mail-out questionnaires could be used in lieu of additional group meetings if the latter are needed but cannot be arranged.

17. See, e.g., Madden, J.M., Hazel, J.T. & Christal, R.E. Worker and supervisor agreement concerning the worker's job description. Personnel Research Laboratory, Aerospace Medical Division, Air Force Systems Command, 1964.

18. We define a critical task in this context as one which is significant on all three dimensions: frequency of occurrence (number of times a task is checked); relative amount of time spent; and, relative importance to job objectives. More routine, less critical tasks are less significant on one or more of these dimensions.

19. The Board of Examiners should find the critical incident data most useful in examination development and validation stages.

PROJECT STAFFING AND TIME SCHEDULE

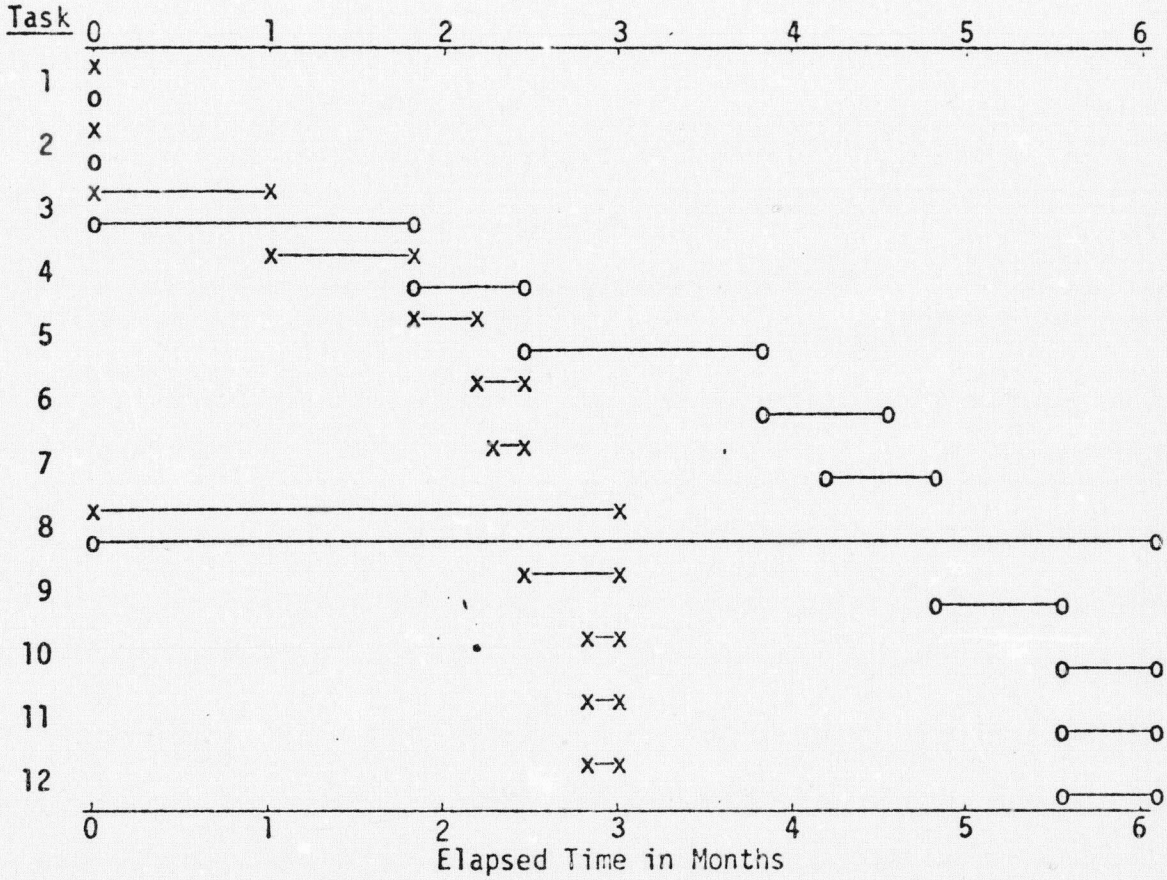
The project manager for the A.I.R. effort would be Dr. Gary B. Brumback, who is a Senior Research Scientist in the Human Resources Research Group (HRRG) located in the Washington Office of A.I.R. As project manager he would be primarily responsible for the planning of project activities as well as the day-to-day supervision of project efforts. He would also participate in the actual conduct of several of the tasks.

For a three-month target date, the staffing would include, in addition to Dr. Brumback, the following A.I.R. professional personnel in the HRRG; Dr. Dorothy S. Edwards, Principal Research Scientist, Ms. Tania Romashko, Associate Research Scientist, Mrs. Jean R. McNelis, Associate Research Scientist, and a research assistant to be designated. For a six-month target date, the above staffing would remain the same with the exception of Dr. Edwards. For either target date, Mr. Clifford P. Hahn, Director of HRRG, would serve as a senior advisor to the project.

The time schedules for the three and six-month efforts are shown in Figure 1.

FIGURE 1

Time Schedules for Three-Month Effort
and Six-Month Effort



x = Three-Month effort
0 = Six-Month effort

RELATED EXPERIENCE

Since its establishment in 1946, A.I.R. has completed approximately one thousand research and development projects for a wide variety of civilian and military governmental agencies, private industrial and commercial organizations and foundations. Many of these have involved work of relevance to the work proposed here.

A.I.R. is currently conducting several projects for the New York City Department of Personnel. These projects are directly concerned with the development and validation of selection procedures in accordance with the EEOC Guidelines. One project is concerned with establishing a prototype system of job analysis, test development and validation for preparing written tests that are used for initial selection and promotional purposes, and for preparing procedures for evaluating records of training and experience as a selection device. Another project is focused on prototype procedures for analyzing the physical demands of jobs and developing job related physical ability tests which will predict successful job performance. A third project is concerned with the development of a specific, content valid written test. These projects, planned by Dr. Edwin A. Fleishman, Senior Vice President and Director of the Washington Office of A.I.R., and Mr. Hahn, are being conducted under their general supervision. Dr. Brumback is currently primarily responsible for these projects. He is supported by Ms. Romashko for both job analyses and physical test development, and Dr. Edwards and Mrs. McNelis for written test development.

Mr. Hahn is currently managing a project to develop and validate selection procedures for factory maintenance men of the Brown & Williamson Tobacco Corporation. This project is following the Guidelines in the job analysis/test development/validation process.

A.I.R. also recently completed the development of Certification Examinations for therapy aides for the New York State Department of Mental Hygiene. These job related examinations, concerned with numerical operations, communication skills and mental health and behavior, have been used to certify employees and allow them to enter a new career ladder. Means for the various test scores for Whites, Blacks, and Spanish-speaking groups were very similar, although the variance of the minority groups was somewhat greater than for the Whites. This effort was under the co-direction of Dr. Edwards and Mr. Hahn, with support from Mrs. McNelis.

A.I.R. is also conducting a project for the Air Force to develop performance criteria at the job task level. This project involves aircraft mechanics, ground radio communication equipment repairmen, and communication center operators. It involves selecting from the 200-400 job tasks identified by current Air Force job analysis procedures those forty to fifty critical tasks which best discriminate between good and poor performers. Each of these tasks' dimensions of task performance such as quality, speed, self-initiation, thoroughness, etc., were examined and self, supervisor and peer rating procedures were developed to rate job incumbent performance on the critical job task dimensions. Mr. Hahn is primarily responsible for this project.

A.I.R. is currently collaborating with two other firms in a national survey of manpower needs in the law enforcement and criminal justice fields. A.I.R. is responsible for identifying and analyzing the key occupations within those fields. Mr. Hahn, Dr. Edwards and Dr. Brumback are contributing to that effort.

Some additional projects, a number of which involved personnel from the Washington Office who would be available for consultation or work on this project, are abstracted below. These projects are illustrative of A.I.R.'s substantial experience in the areas of job analysis, test development and validation, job analysis training, and job performance criteria.

Critical Requirements for Effective Performance as a Research Administrator

This planning study, to define the critical requirements for effective research administrator performance, was accomplished by reviewing research and literature and by disucssing the topic with administrators of research and academic people who have been actively involved in research or research management and related areas. E-9. CARNEGIE CORPORATION

Critical Requirements for Research Personnel

Critical incident data were systematically collected from a sample of experienced research workers in scientific and engineering groups, in order to determine the critical requirements for successful participation in research and engineering work. This study was part of a comprehensive research program concerning the selecton and evaluation of research personnel. A-5. U.S. DEPARTMENT OF THE NAVY, OFFICE OF NAVAL RESEARCH, HUMAN RESOURCES DIVISION, MANPOWER BRANCH.

Critical Performance Requirements for Orthopedic Surgery

Derivation of a an explicit and comprehensive behavioral definition of "competence in orthopedic surgery from critical incident data." The definition was expected to have potential application as a criterion of competence which the American Board of Orthopedic Surgery could use in evaluating and possibly revising their examinations for certification. Critical incidents -- factual reports of situations in which colleagues had been observed to perform either competently or incompetently -- were classified into nine major areas of competence, 28 sub-categories, and 94 behavioral sub-areas. E-6. UNIVERSITY OF ILLINOIS, OFFICE OF RESEARCH IN MEDICAL EDUCATION.

Critical requirements for Pharmaceutical Representatives

Critical incident data were collected to establish critical requirements for sales representatives of a large pharmaceutical company as a first step toward specific improvements in company procedures for selection, training, and proficiency evaluation. Requirements were analyzed in these areas: mastering technical information and procedures; showing sales acumen and finesse; meeting responsibilities conscientiously; developing effective personal relationships. B-52. CIBA PHARMACEUTICAL PRODUCTS

Critical Aircrew Job Requirements and Aircrew Job Element Aptitude Tests

A broad program of research concerned with an analysis of aircrew specialties and the classification of aircrew personnel was conducted in three major phases: development of a job analysis procedure based on the critical incident technique; identification of aircrew job elements involving ability factors and non-ability factors such as attitudes and temperament; further refinement and definition of the aircrew job elements and construction of paper-and-pencil aptitude tests to measure the various job element aptitudes. U.S. DEPARTMENT OF THE AIR FORCE, SCHOOL OF AVIATION MEDICINE AND HUMAN RESOURCES RESEARCH CENTER

Analysis of Helicopter Pilot Performance

Identification of critical component abilities involved in piloting helicopters; development of refined methods for measuring these components; development of using performance measures singly and in combination; and a study of factors related to decrement and recommendations for the reduction of this decrement. HQ., U.S. ARMY MEDICAL R&D COMMAND, OFFICE OF THE SURGEON GENERAL.

Human Performance Requirements for the CX-HLS Aircraft

Analysis of critical maintenance activities and ground operations for the CX-HTS (Douglas C-5a) aircraft including analysis of task steps, time required for performance of tasks, requisite knowledges, skills and abilities, and other factors in the system. E-44. PLANNING RESEARCH CORPORATION.

Personnel Requirements for the High Capacity Communications (HICAPCOM) System

An early determination was made of personnel, training, and selection requirements for a personnel subsystem within the HICAPCOM System. Recommendations, based on job task analysis, were essentially a "best fit" between personnel requirements of the equipment still under development and existing selection criteria, job structures, and training content. In phase II, maintenance training requirements for single sideband radio equipment were predicted. A computational procedure was developed for forecasting phase training input requirements to meet anticipated maintenance demands, qualitative training requirements for the newly developed type of radio equipment were prepared. C-44. U.S. DEPARTMENT OF THE NAVY, BUREAU OF NAVAL PERSONNEL, PERSONNEL RESEARCH DIVISION.

Special Education Requirements of Detroit Edison Jobs: Preliminary Study

First of a planned three-phase program to develop generalizable procedures for determining "specialized" (i.e., formal, other than on-the-job) education requirements for Detroit Edison jobs. A sample of four jobs was analyzed and described: Primary Meter Tester, Secondary Meter Tester, Field Meter Tester and Investigator, and Field Meter Tester. Skills and knowledge requirements were derived for all tasks within these jobs to ascertain which could best be filled by: (a) job entrance requirements for new hires, (b) on-the-job training, (c) specialized education. H-14. DETROIT EDISON COMPANY

Predicting new Air Force Position Qualifications

A survey of the literature on prediction of Air Force personnel requirements, to provide background for the establishment of standard techniques and procedures. Methods of describing or analyzing positions or tasks, determining skill level for positions for which the associated equipment is not yet developed, combining work units and tasks into positions, and estimating the number of people required in a system were the areas examined. C-1. U.S. DEPARTMENT OF THE AIR FORCE

Development of a Clerical Skills Inventory

Analyze bank clerical positions in terms of core skill requirements, establish skills vocabulary, design inventory as a base for improving need assessment techniques, training programs and career development activities. This is the first-month funds authorized of a six month overall study estimated at $35,000. 29200. THE CHASE MANHATTAN BANK

Research on Methods for Determining Task Strategies

Study to develop techniques that can be applied in increasing the substantive specifications of training requirements in terms of task content--to devise systematic methods for extending task analysis to include performance strategies. U.S. AIR FORCE.

Field Survey to Evaluate an Experimental Set of Officer Duty Modules

This is the second of three projected contracts concerned with the design and evaluation of an experimental set of officer "duty modules." Contract Number Two calls for task inventory surveys of officer incumbents which will establish whether the "job content" modules identified during Contract Number One are also "duty assignment" modules. DEPARTMENT OF THE ARMY.

Feasibility of the Questionnaire Approach to Job Evaluation

Exploratory work using a relatively new approach to job evaluation. This study was conducted to determine the feasibility of systematically evaluating Air Force Officer positions by means of a job evaluation questionnaire composed of objectively stated, multiple-alternative items. A 300-item Job Evaluation Questionnaire (with items sufficiently subtle, objective, and comprehensive to serve as effective predictors and discriminators of grade and/or pay) was constructed and administered in a mailed questionnaire format to a sample of Air Force Officers ranging in grade from Lieutenant through Colonel and covering positions in 23 different career utilization fields. U.S. DEPARTMENT OF THE AIR FORCE.

Performance Standards for Key AID Jobs

Research to identify sets of job standards for key positions in overseas foreign assistance missions and to develop and test an economical method for reviewing job standards overseas whenever program requirements change. AGENCY FOR INTERNATIONAL DEVELOPMENT.

Review of Examining Program of New York State Department of Civil Service

Objectives of the study included a general overview of testing problems and practices; review of similarities and differences in prerequisites and evaluative methods for groups of positions at different levels and in major occupational categories; and interpretation and utilization of evaluative data in personnel selection and placement. The study also investigated the feasibility of fuller utilization of computer technology in development, administration, and scoring of tests and in assignment of personnel. NEW YORK STATE DEPARTMENT OF CIVIL SERVICE.

Development of Certification Examinations for Therapy Aide Positions in New York Department of Mental Hygiene

This projects called for development of qualification tests for a new career field in the medical area. The tests are to be used by the State of New York in their program of improving health care services. Three forms of tests in three areas were developed--communication skills, numerical skills, and patient care knowledge. NEW YORK DEPARTMENT OF MENTAL HYGIENE

Scores Selection and Placement Battery

Development and validation of a classification battery designed for selection and placement of higher level personnel. Battery consists of 19 aptitude and 3 interest tests which provide 38 separate scores forming six composite scores: Supervision, Creativity, Organization, Research, Engineering, and Salesmanship--SCORES. AMERICAN INSTITUTES FOR RESEARCH.

Development of Alternate Form of the Career Qualification Battery

For each of the nine types of CQB items twice the number were developed and administered to 300 college students along with two existing forms. FORT MEADE PROCUREMENT DIVISION, DEPARTMENT OF THE ARMY.

Achievement Tests for Navy Officer Candidate Programs

Construction of comprehensive achievement tests for officer candidates to measure abilities in solving technical and professional problems, and in making sound decisions in novel situations. OFFICE OF NAVAL RESEARCH.

Selection, Training and Evaluation of Navy Officers

A program of research on male and female officers of the Navy including the collection of critical incidents of performance, background variables, peer ratings, and OCS disenrollment; and the development of predictive tests and situation performance problems. OFFICE OF NAVAL RESEARCH.

Scientific Aptitude Test

The development of an aptitude test for the selection of scientific personnel, in order to measure potentiality for research work in terms of predicting specific critical research behaviors. OFFICE OF NAVAL RESEARCH.

Aptitude Tests for Air Traffic Control Personnel

Development and validation of a test battery based on job analysis and criterion behavior specifications, designed to screen candidates for jobs in Air Traffic Control. NATIONAL ACADEMY OF SCIENCES & CIVIL AERONAUTICS ADMINISTRATIONS.

Navy Testing

Evaluation of paper-pencil tests developed to replace certain apparatus tests used by the Air Forces for the selection and classification of aircrew personnel. OFFICE OF NAVAL RESEARCH, MEDICAL SCIENCES DIVISION.

Development of Alternate Forms of the Armed Services Vocational Aptitude Battery

Development and preparation of 2,700 items for use in eight subtests for new forms of the ASVAB. DEPARTMENT OF THE ARMY.

Measuring Nonintellectual Aspects of Officer Aptitude

Development, analysis, and validation of tests to measure nonintellectual aspects of officer aptitude. Findings of previous work involving analysis of critical incidents of successful and unsuccessful officer performance were examined to provide systematic and explicit definitions of nonintellectual behavior. U.S. DEPARTMENT OF THE AIR FORCE, AIR TRAINING COMMAND, HUMAN RESOURCES RESEARCH CENTER.

Development of Valid Situational Tests of Leadership

Observation of "Leaders Reaction Test" administration and scoring procedures at three different Army posts indicated the necessity of a redefinition of infantry noncommissioned officer leadership requirements and a means for scoring observed performance. A new test was developed, on the basis of critical incident data, and tried out. Incidents were furnished by experienced infantry personnel describing situations indicative of both highly effective or ineffective leadership behavior, both on maneuvers and in actual combat. U.S. DEPARTMENT OF THE ARMY, ADJUTANT GENERAL's OFFICE.

Situational Problems for Junior Naval Officers

Development and validation of a series of situational performance problems to measure leadership and human relations skills essential for effective junior Navy officers, and for training in effective leadership behaviors. U.S. OFFICE OF NAVAL RESEARCH.

Dev : pment of Service Personnel Selection Tests

Project to develop aptitude tests for predicting success in such service occupations as hotess, receptionist, flight attendant, and so on. UNITED AIR LINES.

Development of Selection Procedures for IBM Processing Division

The review of current selection procedures and the revision of pre-employment tests in the light of changing personnel requirements in the IBM Data Processing Division. IBM DATA PROCESSING DIVISION.

Construction of Examinations for Post Office Department Supervisory Personnel

Construction of tests including the following areas: cleaning, security, telephone operation and elevator operation. Tests were constructed for supervisors in the Postal Field Service and in occupational areas of Building Services. POST OFFICE DEPARTMENT.

Police Selection and Training

A four-year project to study the selection and training of policemen in New York City. Purposes: identification of critical requirements of police work; development of selection tests and training procedures based on rationales relating critical requirements to personality and role-learning variables; validation of these instruments and procedures as a means of predicting or promoting effective job performance of police recruits; follow-up studies of training. C-29. RUSSELL SAGE FOUNDATION and ROCKEFELLER BROTHERS FUND, INCORPORATED.

Preparation of 100 Test Items for Revised AFROTC Exam

Development of test items (multiple choice, short answer, and essay types) as well as scoring keys and suggested item scoring weights for use in the AFROTC Comprehensive Examination. HQ, AFROTC, MAXWELL AIR FORCE BASE.

Leader Selection

Determination of requirements and methods for recruiting, selecting, and training of shelter leaders and managers. OFFICE OF CIVIL DEFENSE.

Standardization of Job Corps Testing Procedures

Preparation of a manual for test administrators at Job Corps rural camps and urban centers. OFFICE OF ECONOMIC OPPORTUNITY.

Test Battery Validation

Validation of aptitude tests used in the qualification of individuals for a variety of jobs at Mason and Hanger-Silas Mason Co., Inc., Plantex Plant. Jobs include most of the manual hourly-rate employees as well as certain clerical employees. Work will include: (1) study of the jobs, (2) the development of a task performance ratings; (3) selection test administration, and (4) an analysis of the interrelationships. MASON AND HANGER-SILAS MASON CO., INC.

Test Battery Evaluation

A study to develop information for reducing three selection and placement batteries to one multiple-purpose battery. U.S. ARMY SIGNAL PROCUREMENT OFFICE.

Validation Studies of the Peace Corps Selection Process

An analysis of the assessment process used in selecting volunteers for the first eighteen Peace Corps projects; based on available criteria of success in training and in overseas job performance. THE PEACE CORPS.

Development of Tests for Peace Corps Selection

Development of a biographical information questionnaire designed to predict which applicants are most likely to operate effectively in performing Peace Corps projects. THE PEACE CORPS.

Development of the Airman Qualifying Examination-62 (AQE)

Development of an alternative form of the Airman Qualifying Examination including items paralleling the current form AQE-F, within the limits imposed by the item pools at the Personnel Laboratory. New items were developed for Airman Arithmetic and Technical Data Interpretation since there was no item pool available for their content. PERSONNEL RESEARCH LAB., AEROSPACE MEDICAL DIVISION, AFSC.

Panel Interview Procedures for Selection of Civilian Supervisors

Development and validation of interview procedures for the selection of blue-collar foremen in Army Depots and performance test procedures for these Wage Board supervisors. DEPARTMENT OF THE ARMY.

Literature Search on Three Tests

A literature search was conducted on the Wonderlic Personnel Test, SRA Non-Verbal Test, and the Bennett Mechanical Comprehension Test. G-8. AMERICAN CIVIL LIBERTIES UNION, LAWYERS CONSTITUTIONAL DEFENSE COMMITTEE

Research on the Professional Placement and Occupational Placement Batteries

A battery of 21 paper and pencil tests and inventories was developed for use in placement of personnel in selected professional jobs. A battery of aptitude tests for selection and placement of personnel for clerical and mechanical jobs was also developed. Four studies were conducted: to make these two batteries operational; to develop an interview schedule and rating scale for use with other instruments in the placement of newly hired personnel; to develop an experimental form of an interest inventory; and, to refine the various instruments. B-16, B-23, B-33, B-34, B-35, B-36. U.S. DEPARTMENT OF THE ARMY, SIGNAL CORPS

Improved Medical Examination

Development and evaluation of a revised Part III medical examination, designed as an experimental test of clinical performance for administration to physicians at the end of their internship year as a prerequisite for licensure. C-21. NATIONAL BOARD OF MEDICAL EXAMINERS

Development of an Objective Engineer-in-Training Examination

Development and evaluation of an objective multiple-choice Engineer-in-Training Examination designed to test knowledge of fundamental engineering subject matter. The examination, the first step toward licensure as a professional engineer, has two parts: Part I consists of Mathematics, Physics, Chemistry, Economics, and Electrical; Part II consists of Mechanics, Kinetics, Thermodynamics, Fluid Mechanics, and Strength of Materials. F-5. STATE REGISTRATION BOARD FOR PROFESSIONAL ENGINEERS OF THE COMMONWEALTH OF PENNSYLVANIA

D.O.T. Training Materials

The development of a course of self-instructional materials to assist the Bureau of Employment Security in instructing for the use of the Dictionary of Occupational Titles. BUREAU OF EMPLOYMENT SECURITY, U.S. DEPARTMENT OF LABOR.

Application of Self-Instructional and Programmed Procedures to the "Physical Demands Analysis" Portion of Job Analysis Training

A study to assess the feasibility and operational benefits of applying self-instructional procedures to specific Bureau of Employment Security training programs. BUREAU OF EMPLOYMENT SECURITY, U.S. DEPARTMENT OF LABOR.

Workshop on the Use of the Critical Incident Technique in Job Analysis

Development and presentation of a workshop on the use of the critical incident technique in job analysis. Lectures, discussions, and practice in development and application of tasks essential to carrying out critical incident studies, and other data collection procedures. G-38. BELL TELEPHONE LABORATORIES

Development of the Performance Record

The development of the Performance Record, an employee proficiency measurement device, from an extensive survey of effective and ineffective critical job incidents. GENERAL MOTORS CORPORATION.

Evaluating Officer Effectiveness

Development of a procedure for evaluating the effectiveness of Air Force officer performance by means of the critical incident technique in order to incorporate a system of promotion based on officer merit. AIR SURGEON GENERAL'S OFFICE.

Generalization of Relationships Between Task Characteristic Index and Criterion Measures

During this third phase of the research, the relation between task indices and training effectiveness criteria will be studied in the lab and field. The interaction of training variables and task indices will be explored and application of the indices will be expanded to include other types of devices. NAVAL TRAINING DEVICE CENTER, DEPARTMENT OF THE NAVY

Development of Task-Level Job Performance Criteria

A forty-month effort to develop and try out a system for Airman Job Performance Measurement at job task level for ultimate use as research criteria for the evaluation of selection, training, and other aspects of personnel programming. AEROSPACE MEDICAL DIVISION, U.S. AIR FORCE.

Job Standards for District Superintendents

The development of objective standards of managerial performance to assist the supervisor in judging the actual performance of his managerial subordinates. AMERICAN TELEPHONE AND TELEGRAPH COMPANY.

Power Company Orientation to Use of Performance Record Procedures

Introduction and oreintation to use of Performance Record procedures (to evaluate employee performance) for personnel of the Ohio Power Company of the American Gas and Electric Corporation. A-75.. AMERICAN GAS AND ELECTRIC CORPORATION

Objective Proficiency Check for Private Pilot Certification

Development of an objective flight-check to improve the measurement and evaluation of critical skills necessary for safe and efficient flying by private pilots. A critical incident analysis was used in developing this proficiency check for initial certification purposes. A-15, A-32. NATIONAL ACADEMY OF SCIENCES AND CIVIL AERONAUTICS ADMINISTRATION

Air Traffic Control Performance

Development and improvement of procedures for evaluating the proficiency of air route traffic controllers, including a detailed analysis of the job and the design of an evaluation form based on job requirements. Evaluation of "Air Traffic Control Performance Record" to determine its reliability and consistenc, and its practicality for evaluating controller proficiency. A-9, A-13. NATIONAL ACADEMY OF SCIENCES AND CIVIL AERONAUTICS ADMINISTRATION

Criterion Measures for Research Personnel

Development of tests to measure proficiency in specific areas of scientific work. Included development of the Observational Record Form for Research Personnel, manuals and training procedures for a field try-out, to be used with a representative sample of supervisors in governmental laboratories. A-20. OFFICE OF NAVAL RESEARCH, HUMAN RESOURCES DIVISION

GARY B. BRUMBACK
Senior Research Scientist
Human Resources Research Institute

Education

Indiana University, A.B., 1958
The Ohio State University, M.A., 1960
The Ohio State University, Ph.D., 1963

Honorary Societies

Phi Beta Kappa
Sigma Xi

Professional Affiliations

American Association for the Advancement of Science
American Psychological Association

Previous Experience

During his graduate training, Dr. Brumback served as a Research Assistant and was responsible for constructing and testing paper and pencil measures of human value acts and for factor analytical studies of a variety of samples of data collected by those measures.

Dr. Brumback joined the Columbus, Ohio Division of North American Rockwell Corporation in 1962 where he worked for a year as a research psychologist on problems of human information processing.

At the beginning of 1964, Dr. Brumback joined the U.S. Department of Health, Education and Welfare in Washington, D. C., as a research psychologist. He was responsible for directing employment-centered research studies of commissioned officers in the United States Public Health Service.

Dr. Brumback also served as both an in-house and external consultant for several groups, including the USPHS Global Community Health Career Development Program, the USPHS National Health Service Corps, and the National Oceanic and Atmospheric Agency. He has been a manuscript reviewer for two scientific professional journals.

A.I.R. Experience

Dr. Brumback joined the Washington Office of A.I.R. early in 1973 as a Senior Research Scientist in the Human Resources Research Institute. He is currently directing projects on models for job analysis and test development/validation for one of the largest civil service employment systems in the country and is participating in the analysis of key occupations within the law enforcement and criminal justice fields.

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Brumback, G. B. (Chm) Toward a Psychology More Responsive to the Public Health. Symposium presented at the annual convention of the American Psychological Association, Honolulu, September, 1972.

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CLIFFORD P. HAHN
Institute Director
Human Resources Research Group

Education

University of Wisconsin, B.B.A., Industrial Management, 1949 University of Pittsburgh, M.S., Industrial and Personnel Psychology, 1951

Professional Affiliations

American Association for Advancement of Science American Psychological Association District of Columbia Psychological Association Midwest Psychological Association Certified by the Maryland State Board of Examiners of Psychologists

Previous Experience

In 1954 and 1955 Mr. Hahn was a member of the Research Division of the South Central Home Office of the Prudential Insurance Company of America. In this position he was responsible for planning and executing studies assessing market potential for new sales agencies, developing cost and expense control procedures for sales agencies, analyzing consumer behavior and advertising effectiveness and selecting and training sales managers.

A.I.R. Experience

Mr. Hahn first joined AIR in 1949 under a research assistantship combining graduate study and research work. His activities as a project associate and later as a project director included studies concerning job and task analysis for military and civilian agencies, selection and classification test construction and validation and job performance evaluation procedures.

In 1955 Mr. Hahn rejoined AIR as a Research Scientist. As a project director and subsequently Director of the Human Resources Research Program and its Accident Research Center, and currently as the Director of the Human Resources Research Group, he had directed numerous studies involving selection and classification instruments and procedures, situational performance tests particularly for leadership and human relations skills, performance measurement and evaluation, curriculum evaluation, training materials and procedures, attitudes and motivations, particularly as they apply to job and career satisfaction, system analyses, operations research analyses, and automotive, industrial, and home safety. Some of the studies with which he has been affiliated follow.

He directed a three year study concerned with educational programs in correctional institutions. This primarily concerned youthful offenders serving indeterminant sentences but included other types of correctional institutions. This included work with the D.C. Department of Corrections Youth Center, the Maryland State Penitentiary, the Massachusetts Correc-

tional Institution, and the Draper Correctional facility in Alabama. He also worked with the Director of A.I.R.'s Center for Research in the Administration of Justice in developing plans for other projects.

He has been involved in the development of achievement test items on areas of skill and knowledge suitable for grade levels 1-9 for use with educationally deficient adults to determine achievement levels in relation to level needed to obtain and hold gainful employment; developing techniques for assessing reading and writing effectiveness for USAF personnel; and development of a proficiency test for use in the operation and maintenance of the Navy's SUBROC system.

Mr. Hahn was concerned with studies evaluating program effectiveness. One evaluation was of the Franklin Institute to determine the extent to which the program met its objectives of arousing an interest in science in its students. Another was conducted for the National Science Foundation's Summer Science Training Program following up participants to see if the program accomplished its goal of encouraging talented high school students to pursue careers in science.

He has been involved in studies of test development and validation, selection procedures and measurement. One of these projects was concerned with measurement of individual differences in respect to critical aircrew job requirements. He helped develop a Professional Placement Battery of tests and inventories for personnel classification in selected professional jobs and an Occupation Placement Battery of aptitude tests for clerical and mechanical personnel.

His involvement with self-instructional materials has concerned a study to demonstrate the feasibility and effects of using a variety of self-instructional procedures in correctional institutions; application of self-instructional learning procedures to the "Physical Demands Analyses" portion of Job Analyses Training; and training and supervising Census Bureau personnel in the development of self-instructional home study materials for training enumerators in procedures for the 1964 agricultural census.

He has directed or participated in projects concerning leadership. Several of these were sponsored by the military. One study developed and validated a series of situational problems to measure leadership and human relations skills essential for junior Naval officers, and a second developed procedures and training materials including situational problems for leadership training of Petty Officers.

Studies involving curriculum research included an Air Force Academy research study providing information on skills and knowledge requirements and career motivation factors associated with officer jobs at various levels in a variety of major commands. Another study developed guide lines concerning the application of advanced educational technology of learning such as programmed instruction and CCTV for use in Marine Corps schools and training activities. Also developed for the Marine Corps was a methodology to enable Marine Corps personnel to systematically evaluate technical schools for enlisted personnel.

Some personnel and training studies included the feasibility of using information in Air Force officer personnel files for identifying qualification variables relevant to success in selected officer specialties. There was a study for the Navy on the application of operations research techniques to an analysis of the Navy personnel system resulting in a model capable of simulating policy changes and their effects upon personnel supply; a study in Government and industry involving the collection and evaluation of personnel and training information in terms of its implications for military personnel and training problems; and a project reviewing selection procedures and revision of pre-employment tests for data processing personnel in a company because of changing requirements. There was also a rather large study of personnel research on selection and training procedures for a number of businesses concerning the value of various programs of management development carried out by successful industrial organizations to ensure an adequate supply of managers.

In the area of industrial, automotive, and home safety, Mr. Hahn directed or participated in several major studies. One of these concerned the development of recommendations for a research program on the human factor aspects of highway safety. Another concerned the development of a national program to encourage increased use of automotive restraint systems. Three studies were concerned with driving behaviors and modifying such behaviors using simulators and filmed techniques in teaching self-perception to drivers. He directed a study analyzing Army accident data for exploitable relationships that would lead to recommendations for future routine analyses of such data which might be helpful in reducing the number and severity of accidents. Another study concerned behavioral compromises of safety made and allowed by production workers, supervisors, staff personnel and upper management in government and privately run munitions plants. Critical incident data and the use of incomplete sentences provided information on the kind of compromises made and the frequency. He was also concerned with a conference of top scientists on various aspects of research on childhood accidents.

Mr. Hahn served as a member of an advisory panel for an A.I.R./National Highway Traffic Administration project to develop standards for driver training simulators, ranges, and modified vehicles. He also served on an advisory panel for the American University/National Traffic Safety Administration U. S. Coast Guard Driver Training Project. He has also served as a consulting editor for Behavioral Research in Highway Safety and as a member of the Highway Research Board Effectiveness of Operational Measures Committee.

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Hahn, C. P., & Edwards, D. S. Report of feasibility study of safety considerations regarding U. S. Army Munitions command operations. Washington, D. C.: American Institutes for Research, February 1967.

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DOROTHY S. EDWARDS
Principal Research Scientist
Human Resources Research Institute

Education

Tulane University, B.A., Experimental Psychology, 1944
University of Wisconsin, M.A., Experimental Psychology, 1945
Western Reserve University, Ph.D., Industrial Psychology, 1955

Professional Affiliations

American Psychological Association
District of Columbia Psychological Association

Previous Experience

Dr. Edwards taught introductory, experimental, and educational psychology, motivation, and statistics at the Woman's College of the University of North Carolina from 1947 to 1948.

For four years she was with the Department of the Army, Personnel Research Branch, AGO, (now the Behavior and Science Research Laboratory) as a Research Psychologist working on a variety of military personnel problems primarily concerned with rating techniques for both predictor and criterion variables.

She was with Western Reserve University from 1952 to 1954 as a Research Associate in the Personnel Research Institute where she was involved with personnel research for industrial concerns. This included test development and evaluation forms, primarily, with some experience in personnel audits.

For the next two years she was with the Department of the Air Force, Directorate of Civilian Personnel, Civilian Personnel Research Branch. She served as a project director for development of Job Information Tests for all Air Force Wage Board positions and also directed smaller projects concerning turnover in civilian personnel offices, and preliminary validation of a personality inventory for selection of personnel for overseas positions.

From 1958 to 1963 Dr. Edwards taught Introductory Psychology at the University of Virginia Extension Division.

A.I.R. Experience

Dr. Edwards is the Assistant Director of the Occupational Research Program and Associate Director of the Accident Research Center. She is also the Director of the Washington Office Testing Center which is responsible for administration of the Aircrew Selection Battery, sometimes known as the Stanine Tests.

She has participated in and directed numerous projects involving educational research. These have included evaluation of the AFROTC curriculum and development of new measuring instruments for use by Hq. AFROTC to determine the extent to which their program was meeting its stated objectives both in terms of cognitive skills and knowledges and attitudes and motivations toward careers in the Air Force. She is presently directing a project sponsored by the National Institutes of Mental Health to evaluate the educational effects of a toy lending library on culturally disadvantaged children in a Washington, D. C. ghetto area.

Dr. Edwards directed a project for the Bureau of Employment Security of the Department of Labor involving the development of self-instructional training materials for use in training BES and other government personnel in the use of the new edition of the Dictionary of Occupational Titles.

She has been involved in projects of test development, validation and selection procedures involving populations from a wide range of academic and socio-economic backgrounds. She participated in projects developing test batteries for high school students in Project TALENT, for selection of air line hostesses, and developed items for alternate forms of the Armed Services Vocational Aptitude Battery. She was involved in developing a Professional Placement Battery of tests and inventories for personnel classification purposes on selected jobs and for an Occupation Placement Battery consisting of aptitude tests for selection and placement for clerical and mechanical jobs. These batteries were validated and refined instruments developed. A manual was prepared for test administrators at Job Corps rural camps and urban centers. This project was followed by a second which revised the manual to accommodate changes made in Job Corps testing programs. Then a parallel manual was developed for use in the Women's Centers after review and revision of Job Corps tests for female enrollees. She has also constructed tests for Post Office supervisory personnel, the Signal Procurement Office, and a Career Qualification Battery for a Department of Defense agency.

She has directed or participated in four studies involving industrial and automotive safety. Three of the studies were funded by the Public Health Service. The first involved improving public safety through observation of driving behaviors without the drivers' knowledge; the second involved the application of movie techniques to determine the effects of training in self-perception on driving behaviors; and the third study was a comparison on on-the-street performance of drivers with performance on driving simulators to determine what driving behavior is reproduced and whether the simulator provides a realistic sample of road performance. The fourth study was performed in military and privately run munitions plants to determine the nature and frequency of behavior compromises of safety made and allowed by production workers, supervisors, staff personnel and upper management.

Dr. Edwards was Project Director of a study to develop certification examinations for Therapy Aide positions in the New York Department of Mental Hygiene. Prior to test development, this project required face-to-face in-depth interviews with employees and supervisors of mental hospitals and state schools for the retarded throughout New York State. Subsequently test items and training materials were developed for three subject matter areas--Communications, Math and Mental Health and Hygiene. This test was used for certifying Therapy Aides for promotion, and was built according to criterion-referenced test principles.

She has recently completed a study of the Civil Service Commission Worker Trainee program aimed at identifying characteristics of good and poor workers in low level unskilled jobs. The project involved interviewing and surveying about 1000 workers and their supervisors.

Dr. Edwards is currently Project Director for two test development projects sponsored by the U.S. Army Research Institute. One is concerned with development of an item pool for the AFQT, the other for development of an item pool for the ACB.

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JEAN R. MCNELIS
Associate Research Scientist
Human Resources Research Institute

Education

George Washington University, B.A., Psychology, 1960
George Washington University, Graduate Courses, Psychology, 1961-62, 1964

Honorary Societies

Phi Beta Kappa
Psi Chi

Professional Affiliations

American Statistical Association

Previous Experience

Prior to college, Mrs. McNelis was employed for five years as a writer and producer of radio and television commercials for a Washington advertising agency. After college she completed several consulting assignments for a number of research organizations in the Washington area including Performance Research, Inc.; Computer Applications, Inc.: and the Educational Research Project and Psychological Clinic of the George Washington University. Primarily these assignments have involved developing tests, questionnaires, and training manuals in both self-instructional and traditional formats for a wide range of subjects such as children, disadvantaged adults, and college graduates. While in graduate school she served as a Research Counselor at the Psychological Clinic of George Washington University where she interpreted test results and provided academic counseling for students.

A.I.R. Experience

Mrs. McNelis joined A.I.R. in 1961. She has participated in a number of studies in the area of content analysis. These include studies to determine the feasibility of predicting success in officer jobs from Air Force Personnel records and for predicting success in Peace Corps jobs from the narrative sections of Peace Corps application forms. For both of these studies she participated in the development of category systems suitable for content analyses and data processing.

In the field of testing, she has contributed to the development of achievement tests for grade levels 1 through 9 for use with educationally deficient adults; developed test items for alternate forms of the Armed Services Vocational Aptitude Battery (ASVAB); and test items to be used in the selection of supervisory personnel for the U. S. Post Office Department.

Mrs. McNelis has also been involved in training and education. In the field of programmed instruction, she contributed to remedial arithmetic and reading manuals for a group of youthful offenders in a local correctional institution, to a two-volume manual to teach Department of Labor personnel how to use the Dictionary of Occupational Titles; and to a semi-programmed text to help college students develop effective study habits. Other educational endeavors involve the operation and evaluation of a Toy Lending Library for very young children and the evaluation of the correlated curriculum project for Junior High School students in New York City.

In the field of job evaluation, Mrs. McNelis served as Project Director on a study to develop and administer an experimental mailed questionnaire to predict rank and grade of U. S. Air Force officers. This involved the primary responsibility for questionnaire development, administration of a large-scale mail survey, data collection, and the preparation of the project report. Also in the survey field, she has developed questionnaire items and interviewed in-person subjects with a wide range of socio-economic backgrounds. One such project, funded by the U. S. Civil Service Commission, involved the interviewing of several hundred disadvantaged and their supervisors participating in the Worker Trainee Program.

The studies described above have included some or all of the following activities: task analysis, development of criteria, development and administration of project materials, data analysis, and reporting of project results.

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TANIA ROMASHKO
Associate Research Scientist
Human Resources Research Group

Education

Michigan State University, B.A., 1966
Michigan State University, M.A., Political Science, 1967

Previous Experience

In 1963, Miss Romashko was a statistician at Royal McBee Corporation, responsible for preparing budgets, quotas, weekly, bi-weekly and monthly reports of actual versus projected sales and performed other analyses.

At Foot, Cone & Belding, from 1963-65, she was an Audio-Visual Specialist, operating various types of audio-visual equipment. She recorded, edited, dubbed and mixed audio tapes and edited films.

Miss Romashko was a Research Assistant at Michigan State University where she conducted a 10-year content analysis of Chinese Mainland magazines to identify changes in emphasis of various types of social, political and economic relationships. She performed statistical analyses of Chinese refugee data. Miss Romashko also reviewed and evaluated previous research on the effects of threat induced by written and oral communication. She coauthored an introductory programmed text on information theory.

At Honeywell, Inc., she was an Electronic Data Processing Trainee and operated computer and peripheral equipment. She also wrote machine language programs for the Honeywell 1200 computer system.

A.I.R. Experience

As a member of a research staff on an extensive project to develop a task taxonomy of human performance, she participated in the development of Task Assessment Scales (TAS), employing cognitive, perceptual-sensory, psychomotor and physical abilities as one system of classifying tasks. She was involved in a series of interlocking studies to evaluate the effectiveness of the abilities approach for organizing and generalizing research results for an area of experimental literature. She was further involved in evaluation of the usefulness of the abilities approach to the task classification of vigilance research by determining the extent to which abilities could differentiate task performance and the extent to which such performance could be differentiated with respect to selected independent variables.

She is presently involved in a series of interrelated projects for New York City involving the use of a variety of job analysis techniques with selected Civil Service jobs including abilities analysis, physical

demands analysis, job inventory, critical incident technique and the Position Analyses Questionnaire. She has participated in the comparison of various job analysis procedures for test development for personnel selection. She is primarily concerned with the development of a procedure to validate physical tests for a variety of City jobs with physical requirements.

She has also been involved in the job analysis and subsequent test development for promotion to Therapy Aides in New York State.

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Transcript of Hearing before
Judge Tyler, dated January 14, 1975

jgesb

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

Beston M. Chance, Louis C. Mercado, et al,

Plaintiffs,

vs. 70 Civ. 4141

The Board of Examiners and the Board of Education of the City of New York, et al,

Defendants.

- x

Before:

HON. HAROLD R. TYLER, JR.,

District Judge

January 14, 1975
4:15 p.m.

APPEARANCES:

Elizabeth B. DuBois, Esq. and
Jeanne R. Silver, Esq.
Attorneys for Plaintiff
By: Jeanne R. Silver, Esq., of Counsel

Adrian P. Burke, Esq.
Corporation Counsel, City of New York
Attorney for Defendant Board of Education
By: Leonard Bernikow, Esq.,
Assistant Corporation Counsel

APPEARANCES (Continued)

Kaye, Scholer, Fierman, Hays & Handler, Esqs.,
Attorneys for Defendant Board of Examiners
By: Saul Z. Cohen, Esq. and
Howard A. Jacobson, Esq., of Counsel

Frankle & Greenwald, Esqs.,
Attorneys for Council of Supervisors and Administrators
By: Leonard Greenwald, Esq., of Counsel

Michael A. Rebell, Esq.,
Attorney for New York City School Boards Association
Amicus Curiae

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MR. COHEN: Your Honor, just to refresh your recollection as to the state of the proceedings, on December 20th, we filed a notice of motion asking the Court to consider a final plan for examinations for supervisory positions in the New York City school system, we, meaning the Board of Examiners, and that motion was joined in by the Board of Education.

The plan that was submitted was an exact copy of a plan submitted earlier jointly by the parties, only in the earlier plan there were two exceptions that the plaintiffs -- two reservations that the plaintiffs had made, one with respect to the designation of consultants and the other with respect to the question of reporting.

And since those questions could not be resolved by negotiation, the defendant Board of Examiners and the defendant Board of Education submitted their plan and dealt with those subjects.

Subsequently, the plaintiffs submitted a motion in opposition to the defendants' motion and submitted their

own plan with a different treatment of those two subjects, but again the plan submitted is the identical one submitted to the Court earlier as a joint submission.

And then, today, the Board of Examiners and the Board of Education have submitted opposing affidavits to the plaintiffs' earlier submission.

So we are here today to argue about the two unresolved matters that emanated from our earlier submission, and each side has submitted its proposals for how those matters should be resolved.

I think the matters are described in the papers that are submitted and I don't want to burden the Court with an unnecessary repetition, but I think I should just quickly summarize the position of the Board of Examiners. And while the Board of Education has its own counsel, I am informed that their position doesn't differ from ours.

THE COURT: Yes. I just received from Mr. Bernikow an affidavit which he just filed which indicates as much.

MR. COHEN: During the intensive negotiations that took place over a period of more than a year and a half to try and arrive at a suitable plan, one that could be agreed on by all of the parties, the parties agreed that at various points in the plan consultants would be used to

do certain tasks.

In the case of the Board of Education, a consultant was to be used to develop job analyses, which are important for the development of the subsequent examinations.

In the case of the Board of Examiners, they agreed that they would use a consultant to develop certain procedures for validating exams which were developed.

However, in the negotiations the parties couldn't agree on either a consultant or on a method for selecting a consultant. The plaintiffs urged that the matter be one of mutual agreement or in the absence of mutual agreement that it be subject to some form of arbitration with an impartial third party --

THE COURT: No. I understand you don't have to go any further.

MR. COHEN: All right. And our basic point is that with respect to consultants, it was left on the basis that we were going to choose our consultants, we put a blank in there because we hoped that when we told the plaintiffs who the consultant was, they would agree and, therefore, the problem would go away.

Unfortunately the problem did not go away because apparently they raise objections to the designated

consultants, and neither the Board of Examiners nor the Board of Education is prepared to cede the authority and responsibility it has to prepare these exams by giving up its right or sharing its right to designate a consultant.

Now, with respect to reporting, we have had endless meetings on the subject of reporting, and basically the problem boils down to a simple proposition.

The defendants say that the plaintiffs are entitled to reasonable information to permit them to determine whether the defendants are abiding by the order that will emanate from the Court or fulfilling the obligations of the plan.

But it seems to defendants that what the plaintiffs are seeking is to become partners with the Board of Examiners and the Board of Education in developing a plan and that they are seeking such a degree of information that we see ourselves involved with them on a continuing, virtually daily basis, where there approval will be required at virtually every step of the way.

We see that this situation will lead to endless negotiations, that we will not get the plan off the ground, that we will find ourselves back in this Court arguing about every jot and tittle of the development of this program, and the whole program which has already been

delayed for almost five years will be delayed even further.

And we think the proposals they are making with respect to reporting are unreasonable, go far beyond what any plaintiff is entitled to expect, and that they should not be accepted by this Court.

MR. BERNIKOW: Your Honor, as you see from my affidavit, we join in Mr. Cohen's remarks and his submission.

We have also submitted a copy of a proposal of our consultant as well as some background material about the consultant, his related experience as well as some resumes of some of the people --

THE COURT: You are talking about Development --

MR. BERNIKOW: No. That is the Board of Examiners'

THE COURT: That is why I asked. I am a little confused. Your consultant is whom?

MR. BERNIKOW: My consultant is A.I.R., and we submitted their proposal as well as some background material about this allegation, its related experience, as well as resumes of the principals of the firm, the people that will be working on this proposal.

MRS. SILVER: Your Honor --

THE COURT: Now, once again, as I frequently am,

I am a little taken aback. Where is Miss DuBois?

MRS. SILVER: She had another engagement today. Professor Cooper is here, and I am here, speaking for the plaintiffs.

As you will see in the papers, it contains my affidavit. Some statements have been made about Dr. Cooper's participation in the negotiations, and he is here, too.

THE COURT: Again, my concern is that as I am constantly thrown off, although I am well aware that Professor Cooper and you are here and you are certainly counsel of record, and I don't want to sound uncharitable, but I'm always confused because of the conflicts that I see, and very consistently see, between having one lawyer in one phase of this and then he or she gets out and another lawyer -- it has been not an abundant joy.

But how do you want to handle this? You want to both argue?

MRS. SILVER: No, your Honor.

THE COURT: Who wants to argue?

MRS. SILVER: I want to argue.

THE COURT: All right.

MRS. SILVER: We have consulted fully on these papers, and in any matter where there is any possibility

that I was not present on an operative important occasion, these matters have all been mutually verified.

However, it is true, as Mr. Cohen points out, that the negotiation, the extensive negotiation of reporting provisions took place primarily in person between him and me.

Your Honor, I think the area of difference just with respect to the point that Mr. Cohen made is that he is talking about delay in effecting a permanent, viable, valid licensing system, and plaintiffs submit --

THE COURT: Yes, because an outsider from Mars or wherever could say that the position of the plaintiffs on both the reporting and the consultant seems to be somewhat inconsistent to the interests of their class.

It does seem to build in all kinds of continuing arguments, and heaven knows we have had a plethora of those since I have known you, and this would only be a built-in guarantee of five to ten years more.

MRS. SILVER: No, your Honor, I respectfully submit the contrary.

The interest the plaintiffs have is in getting a valid and nondiscriminatory licensing system as soon as possible and to that end we have striven very hard to reach an agreement on the basic guidelines and have concurred in

this basic plan.

In accordance with the decisions of the Courts in the circuit and others on testing cases, we are entitled and the Court is entitled to be assured before a new test is administered that the test is valid and job related, at least to the extent that content validation procedures can assure that before the test is administered.

And in the Bridgeport case in this Circuit, in the Vulcan case, the Second Circuit has said that it is appropriate that plaintiffs and the Court see either tests or the substantive material that bears on the question of validity in advance.

In a case relied on by this Circuit, Castro v. Beecher, decided in the First Circuit, the Court said that the plaintiffs and the Court were entitled to be assured in advance that the test was valid in accordance with EEOC guidelines.

Now, the reporting provisions submitted by the defendants here do not afford any of the relevant information in advance of test administration except job analyses. Certainly job analyses are crucial to a determination of validity, but alone they do not establish that a test is valid.

So what defendants are asking your Honor to do is to permit them to administer tests before submitting that material. After that, they urge the Court and the plaintiffs to consider the validity of the tests which will by then have been administered to thousands of people.

And we submit, your Honor, that that is not the way to avoid delay, to litigate the validity of tests after they have been administered is indeed a way to slow down the entire process.

The administration itself will take a great deal of time and certainly greater burden will be imposed on a Court which is forced to decide the validity of tests that many people have invested a lot of time, money and energy in taking and giving.

That is the crucial point of difference.

Our position on the consultants is geared to the same objective. The affidavit of our expert states what I think is obvious, that the way a consultant performs the job analyses is as important as his own paper qualifications in determining whether it will be the basis for a valid test, and we submit that it would be desirable for everybody to examine the qualifications and the intentions of the job analysis firms certainly before the job analysis is performed.

We at the moment, your Honor, have no specific substantive objections to the firm designated by the Board of Examiners, Development Dimensions, to do job validations.

On the other hand, we are in the same position in regard to that firm as we are in regard to A.I.R. We haven't got any information at all on the basis of which we could gauge their intentions.

We think that it would be conducive to expediting progress here for this information to be furnished to us and to the Court in advance.

Now, the defendants reporting provisions also omit to provide for furnishing any significant information whatsoever about the crucial second step of the examination process which the parties have agreed should be a 2-step procedure.

They also omit to require the furnishing of any information on the many other tests for other positions.

We have been very modest in our requests. We have only asked that the latter category of information be furnished to us after the examinations are administered. We think that is a reasonable compromise because the protypical examinations are admittedly going to be the basis for all future examinations. But in effect the defendants, declining to give us what they term minutiae,

are declining to give us any information at all in the category in which this Court and the Second Circuit have held appropriate for submission in cases just like this one.

I might add, your Honor, that this is perhaps a case where it will be more difficult after the fact to determine the validity of examinations. The other cases in this circuit have concerned much less complex, non-professional positions. In those cases possibly, if the exams had been administered and then the Court had found that they were invalid, it might have been relatively easy to re-do the whole process. But here the parties have agreed that ascertaining the qualifications of professional personnel as at the level of school principals and supervisors is complex and difficult, and certainly it would facilitate getting that underway to examine the materials before all the people are tested.

MR. COHEN: Your Honor --

THE COURT: You didn't say much about the consultants, Miss Silver. I must say I don't understand the plaintiffs' position on that at all. It seems to me the Board should have the right to choose its own consultant. You are good enough to say that you have nothing against Development Dimensions, Inc., their apparent

choice.

I really don't even understand that argument at all from your point of view. I really don't.

MRS. SILVER: Let me try to explain, your Honor. The defendants' only reason for saying that it should be allowed to select these consultants is there insistence that they have the right to administer the licensing system and make that selection.

THE COURT: Basically that's what the law says. They do have the right.

MRS. SILVER: That is what the law says, your Honor. But it seems to me that their rights have been somewhat encroached upon by their own past remissness and the adjudication of the Court that they didn't handle this job properly in the past.

THE COURT: I don't see how that goes to the designation of the consultant. I don't share the popular view that the Federal Court should get into this like a big elephant under the tent and be the main ring and the main show in all three sessions, morning, noon and night. I just don't think that is right.

But aside from that, I don't see any advantage to plaintiffs ingoing through all these cumbersome procedures you suggest of arbitration and all the rest.

I just don't see any advantage to you.

MRS. SILVER: Basically, your Honor, all we are asking is that the data on the basis of which the selection will be made and the consultants will proceed be submitted in advance. The effect, we feel, would be that consultants will be retained with some kind of a commitment to proceed in a way that is open and publicized.

We think that that would obviate a lot of trouble later. It will obviously be very difficult later to argue that the consultant was not qualified, didn't commit the amount of highly qualified time to the job, wasn't interested in getting a diverse sample of opinion as required by the plan. And to move backward, trying to prove after the fact that they didn't perform satisfactory, would be both difficult and cumbersome to the Court.

We think, your Honor, that the Court's time and energy will be minimized by advance submission of data and by advance selection and open selection of these consultants on the basis of the proposals furnished in advance.

We assume that this has been a guiding factor in the decision of the other Courts and the other Judges in this circuit, that it would be desirable for this information to be presented in advance.

Just from one example, your Honor, in the New York Guardians case, Judge Ryan decided that he didn't need examinations in advance and the plaintiff shouldn't have them, and on appeal the Circuit Court said that they thought that was a mistake and instructed him, if it was not too late, to order that the examinations be furnished.

MR. COHEN: Your Honor, could I make an observation about these cases that everybody cited?

THE COURT: Yes.

MR.COHEN: The cases are being misused for several reasons. No. 1, this was not an adjudicated case. This was a consent judgment. And the program that has been designed is one that was negotiated by the parties and was jointly submitted to the Court with the exception of several relatively small reservations.

There was never a finding other than the finding that went into a determination to issue a preliminary injunction.

So unlike Vulcan and Guardian and the Bridgeport case, this was not a case which was determined on the merits after a trial in which a Court is called upon to fashion its own remedy.

Secondly, those cases involve single tests, the question of whether you are going to have a fireman's test,

a test for a fireman or a policeman's test. It is the prototype for a lot of testing that comes thereafter.

We are dealing here with hundreds of tests and we are talking about a system which has to get underway, and that is a very different thing from a Court that is confronted with a litigated case in which it is called upon to fashion a remedy and the only thing confronting it is a single test.

And under those circumstances a Court might well come to the conclusion that it may require that the test be presented. We have a very different set of circumstances here.

If you would permit me, I would also like to respond to several other observations made by Mrs. Silver.

For one thing, she talks about the fact that they are only asking for simple material in connection with this reporting requirement, they are only asking for things which are going to avoid future controversies.

That is just absolutely erroneous as a simple reading of the proposed reporting requirement plans will disclose. They are asking -- I can remember one phrase that struck me as really the end in reporting requirements "Summaries of Oral Reports" in connection with various kinds of activities.

They are asking for every action that is taken by the various Boards to be the subject of a report. And more important, they are not just asking that things be reported to them and reasonable men can differ as to what a level of reporting on such a matter as this might be, and I am sure I can say it is on one level and somebody else can say it is on another. But they are not just asking for reporting; they are asking for approval. They are asking for reporting and approval, either by the plaintiff or by the Court.

Now, I can guarantee your Honor that based on the history of this case we will be in this court constantly, if we ever get to a reporting procedure such as they have developed.

With respect to the consulting, they talk about a proposal. The plan is the proposal. The plan is what the consultants are supposed to develop. They are supposed to develop a prototype from the plan. If we have to develop a proposal, then submit it to the plaintiffs, we are off to the raises with a negotiation thatwill be every bit as complicated and as lengthy and as difficult as the won that led to the development of this plan. We have got the plan. We aregoing to give it to the consultants and tell them to help us implement prototype

examinations and with respect to reporting we are willing to give information that will permit them to make the judgments they are entitled to. But they don't -- we didn't want to make them partners before and we do not want to make them partners now.

THE COURT: All right, Mr. Cohen, may I have some help from you? I have never understood page 3 of the Rockowtiz affidavit. I put it aside several times thinking that I must be myoptic, and I am afraid maybe I am. But on page 3 of the Rockowitz affidavit, the last sentence of paragraph 4, he states:

"These reporting requirements are set forth as paragraph V of the plan, Exhibit A hereto."

That's Roman numeral 5 or V, I don't know which.

But I have never been able to be sure what he was talking about.

MR. COHEN: He was talking about the portion that begins on page 23 of the attachment to the affidavit.

THE COURT: Aha. Now, what your motion seeks to do is to have this Court really validate paragraph -- 5 shall we call it, or V?

MR.COHEN: 5.

THE COURT: As contained in the plan attached to the Rockowitz affidavit under the notice of motion,

correct?

MR. COHEN: Correct.

THE COURT: Second, this motion of the defendants seeks to have this Court rule that the defendants are entitled to select the consultants without consultation, arbitration or any other recommendations or formal involvement by the plaintiffs' lawyers.

MR. COHEN: That is correct. In fact, the defendants have already designated the consultants.

THE COURT: Right. A.I.R. and Development Dimensions, Inc.

MR. COOPER Your Honor, while you have that paragraph 5 from page 23 in front of you, you can see very easily what the conflict between the parties is by looking at, first of all sub-paragraph A-3-B, which says "Promptly after examinations are held the following shall be given the plaintiffs' counsel." And then down in paragraph 5-A, "Promptly after the holding of a Step 1 examination."

THE COURT: Right.

MR. COOPER: And each of the items, your Honor, to be furnished there are no more burdensome furnished to the plaintiffs before or after the examination, are no more likely to be litigated if they are furnished

to the plaintiffs' behalf or after the examination. The only difference is, if those items of information are furnished afterward and the plaintiffs have objections to them, those objections will be raised to the Court and the Court will have to decide the validity of plaintiffs' objections in the context of a situation when an examination has already been given. If we prevail in our view the Court will be permitted to confront and decide any objections that plaintiffs have before the examination has been given so that parties' rights have not been prejudiced and so on.

THE COURT: I understand, not because of that language precisely, Professor Cooper, but because of the other half of the acorn here, that is, the motion of plaintiffs in Mrs. Silvers' affidavit I gathered that was it, and of course she made thatpoint in the argument.

MR. COHEN: Your Honor, could I just add one other footnote that I think gets lost sight of sometimes? We have spent an enormous amount of time developing a procedure designed to insure that these exams will be job related and will meet any constitutional standard, not only any constitutional standard that currently exists but is ever going to exist. The prospect of having gone this far, having developed this program and then having the

whole thing really invalidated because of a terrible job by the consultant is a nightmare that is conjured up by the plaintiffs.

MRS. SILVER: Your Honor, I just must say that that really misstates the case. The only way --

THE COURT: I didn't let him finish because I don't really think it is a necessary argument.

However, I must say I do side with the defendants in regard to this business of the consultant. This case is quite a different case than the cases sited by the plaintiffs in the context of the motions of the defendants, which were filed some time shortly after our last court hearing, either the 17th, 18th, 19th or 20th, and then the corresponding notice of motion of course by the plaintiffs of January 6, 1975.

My ruling is that the Board should have the right to go ahead correlative to their responsibilities under state law to make the decision as to what consultant they wish to retain.

I don't think that we can put the plaintiffs attorneys or the plaintiffs in the position of sharing the responsibility of the Board under New York law to do these things in the first instance.

Consequently the Court rules that the defendant

Board must have and will have the full right to make the choice of consultant in the first instance without any consultation of a formal nature or any formal advisors or any arbitration or any other input of a formal nature from plaintiffs' attorneys.

Now, of course, in making this ruling I suppose there might be some practical sense, although it has really already occurred as far as I know, that as a matter of informal discussions between counsel and others I think the plaintiffs' attorneys knew in advance pretty much whom the Board intended to designate, isn't that about so?

MR. COHEN: Correct.

THE COURT: Obviously this Court sees nothing wrong with that, and as a practical matter, if I were commissioned to be your advisors, I would so advise. But as a matter of the Court ruling, I consider the plaintiffs' position to be untenable. I think that where we have a state or local agency which is empowered by state law to do certain things, the presumption should be that they will proceed in good faith and with regularity and they should have the right to go ahead unfettered without any Federal Court orders setting up additional advisors to them.

And that's what I think the plaintiffs' position

would have come down to as a practical and legal matter, and I don't wish to be a party to that.

So I grant that branch of the defendants' motion without reservation.

Now, in regard to the reporting business, it is true that, as both Mrs. Silver and Professor Cooper pointed out, possibly in the future it could well be that if we accept the plan which is set forth in paragraph 5 of the plan which is attached to the Rockowitz affidavit and moving papers, the plaintiffs will only receive these examinations after they are a matter of fact, no doubt of that. And it is possible that the plaintiffs' counsel would be constrained with respect to one or more of these examinations or one of the other steps to come in and seek some sort of specific relief directed against a particular examination or part or step of an examination process. I would be foolhardy, I suppose, to deny that that is a possibility.

On the other hand, I quite agree with Mr. Cohen and the defendants when they argue this isn't really like the cases which have been cited by the plaintiffs in favor of their view of the matter at all.

First of all, we are dealing with two defendants which are in the major business of testing, and as Mr. Cohen

has argued earlier and often there is not just one test which has never existed before which has come about by virtue of a litigated case where the Court thereafter, when the plaintiffs have prevailed, has been obliged under traditional equity principles to fashion its own relief.

Now, those are two major distinctions. First of all, the fact is that the Court did not fashion this relief as such in detail. More important than that point, though, is that we are dealing with two defendants, the Board of Examiners most particularly and the Board of Education, which are in the business, among others, of testing. More than that, there are going to be a variety of tests for a variety of positions.

Some of these tests will not take place for a long time. Some will take place immediately.

I don't think a Federal Court of equity should presume or assume that institutions which are called upon by state and local law to give tests and who are laboring or will be laboring under a judgment of this Court in this case, will then go over the reservations and behave like an organization which has never given any tests at all.

Put differently, I would rather see this court of equity assume that the defendants will follow the principles which were laid down a long time ago in this

litigation, patly by order of Court in the preliminary injunction motion, partly by an agreement thereafter between counsel as encompassed in all the orders and judgments, than just including those going back to May of last year.

Another reason why I refuse to grant the relief which the plaintiffs prays for is that I think the defendants, though they may overstate it and may be guilty of a little excess rhetoric, are nevertheless close to the mark. Once again the plaintiffs' proposals would really make them a co-partner with the Board of Examiners and the Board of Education in administering these tests for the various job classifications, and I don't think that a Federal Court should go that far, at least at this stage in the final judgment.

If it turns out later that in the implementation of the final judgment these presumtpions which I think this Court should indulge in in favor of the defendants are then proved wanting, why that of course may mean, I recognize, an expenditure of time in the litigated sense. But I would far rather run that risk than take the wholly unique step, and I believe despite Mrs. Silver's eloquence that this would be quite different than these cases which she cits, quite different indeed. Those cases were comparatively simplistic and did not deal with

defendants who theretofore had been in the business of testing of any significance at all. In fact, with at least one of them there weren't any tests, in fact I think in more than one.

So I am sorry, Mrs. Silver, but I just do not see it as a necessary ruling by a court of equity that we should ask the defendants to share every detail with you in the implementation of the final plan. You may some day to me that we will have to spend a lot of time litigating some failure or alleged failure on the part of the defendants. I recognize that once again. But I would rather run that risk than take the other route.

So I am going to grant the branch of the motion of the defendants seeking to prove their version of the plan which we will call paragraph 5 as they draft it in the attachment to the Rockowitz affidavit.

MRS. SILVER: Your Honor, I don't like to be heard to quarrel with the decision, but I would like to respectfully submit that we just received the papers of the defendant today, a day later, this morning, and I would request an opportunity to reargue and to submit papers --

THE COURT: Wait a minute.

MRS. SILVER: Arguing those cases.

THE COURT: Who?

MRS. SILVER: We received reply papers from Mr. Cohen only this morning.

THE COURT: Oh, yes. But that is only a rehash of the basic position. You mean the Cohen affidavit of today?

MRS. SILVER: Yes.

THE COURT: You are quite right. I just received it myself and so did you. But, frankly, he just resonds to some of your arguments. But basically it is a rehash, as I see it, quite clearly of their original position.

MRS. SILVER: Your Honor, we feel very strongly --

THE COURT: Of course you do.

MRS. SILVER: -- that the issue we have raised here is very important and is very important to the future of this case.

THE COURT: I don't deny it.

MRS. SILVER: I would respectfully ask an opportunity to reargue.

THE COURT: I don't know what there is to reargue, because I have here your papers, which are substantial, I have your memorandum of law. I don't really know what else you could say.

MRS. SILVER: Well, your Honor --

THE COURT: Except to say you disagree with me, which I accept and respect.

MRS. SILVER: Of course. One of the things that troubles me is that perhaps the welter of words does not sharply enough focus on the facts.

THE COURT: Look, Mrs. Silver, you are far too nitce and far too able for me to deny. And second of all, whatever my thoughts are, Rule 9 of the General Rules of this court certainly permits reargument. But I would submit to you most earnestly, please, if you wish to do this, make it succinct and cover only what you think that I have overlooked.

That's what the rule requires in any event. But I would particularly underscore it here because, you know, we have been talking about this and whittling about it for months. True, it just formally finally came to a head, because I've been complaining so that nobody did anything to bring it to a head. But that doesn't mean that we have been going off in total ignorance of the issue. We have known about the consultant issue since last May at least. We have known about the reporting issue.

You, Mrs. DuBois in particular have told me, perhaps informally I admit, Mr. Cohen has mentioned certain things at other hearings. I've understood thi-s.

MRS. SILVER: I do not discern the distinction which has been raised between this case and other cases involving testing systems, cases against Civil Service Commissions which are in the business of testing --

THE COURT: A, but this was no test theretofore for the kind of thing which was at issue in the case, and also, although I must say I don't accept it as being quite as important as perhaps Mr. Cohen does, this was a situation, our case unlike those cases, where basically to your everlasting credit and the attorneys for the defendants' credit credit you worked out the so-called final plan without those coming to an agreement on these two points.

Also I might add, which I haven't stated, we have really been living sinfully, I suspect in the eyes of the last panel of the Court of Appeals which reviewed this case, under the temporary or preliminary plan. Now, with some possible small halting moments, minute variations, we seem to have lived tolerably well.

You and Mrs. DuBois in particular have pointed out that the Board hasn't been as timely as we asked them to be. That is the fact. But, passing all of that problem, we have come around tolerably well to a livable system.

So again, it isn't quite like those cases you

cite. I mean it seems to markedly differ, in fact, that I don't know quite why you push them.

MRS. SILVER: Well, I think that there is some confusion, your Honor, about the meaning and significance of the plan --

THE COURT: I can't deny the courts have said in these civil rights cases where examinations are involved that all parties or the lawyers should see the proposed examinations in advance. Of course they have, and quite rightly. I don't quarrel with any of those opinions. And it is not just in this circuit and it is not just in recent times. It goes back to at least 1959 or '60.

But I regard this as a somewhat different case to put it midly.

MRS. SILVER: What we would like to do, your Honor, is to focus attention on these three prototypical exams and urge that the specific information, call it detailed or not detailed, that the defendants propose in their Part 5 to submit with respect to those examinations be submitted in advance of the administration of those examinations rather than later.

THE COURT: You made that abundantly clear in your papers, and if you didn't, and that you did today and so did Professor Cooper.

I understand that and I have thought about it.

Mr. Patterson and I discussed it most recently today, and we can see your argument, well, maybe you are right, maybe there will be more litigation, maybe there will be more time we could have in an isolated instance or maybe several instances we could have saved time.

But I do not see how I as an agent of this court can presume that at this late stage in this ancient lawsuit that the defendants are going to go off the reservation on all of these examinations.

MRS. SILVER: Professor Cooper's suggestion that possibly if the burden were on us to come in and object, but we nevertheless got the information sufficiently in advance so that the burden would be exerciseable that would be both fair to plaintiffs and conducive to expeditious resolution of these problems.

THE COURT: Well, there is one thing I would say to you and to Professor Cooper. If I were the defendants in this case, I would, as a practical accommodation, try to get this information to you in advance. But to me that is saying a very, very different thing than requiring this by Court order. It might save a lot of time and fussing if this were done. I agree.

MRS. SILVER: I think that everything that has

happened in this case proves that the defendants cannot as a public body furnish to us in advance information which we have asked the Court to order them to furnish and the Court has said they need not furnish.

It is politically, socially practically impossible for them to do that. And I think that all our repeated appearances before this Court establish that that is so. And that's what Mr. Cohen is saying when he says in effect that they will never agree to anything.

THE COURT: Well, I don't think the latter is quite true. The two things you didn't agree on are the things we are discussing today, and really in a very large sense, and I say this to your credit as well as to the defense counsel, you are responsible for that happy fact. But now we come down to these differences, which have delayed us now for at least six or seven months, and I say that in trying to balance the equities as best I can the ruling should adhere in favor of the defendant.

What I suggest to you, if you make your motion to reargue, you can do it in a letter or in a simple affidavit or however you prefer, but you put your finger on the problem and Professor Cooper did too. You want these papers in advance. That's the crux.

MRS. SILVER: Yes, your Honor.

THE COURT: You have made yourself abundantly clear.

My view of the matter is that that would only breed more problems, more confusion, more delay, more arguments, and I recognize that the burden is on you really to show that they are wrong. It seems to me both under state and federal law some presumption of regularity still must attach even notwithstan-ing this litigation, and that's why I summarized what I summarized and what I said a moment ago.

True, the defendants may have erred and you proved it. But, on the other hand, we have been living under this preliminary system. The City of New York rarely does anything on time, in my experience, around here at least. I know that. But in their own bumbling way I think they might do all right here, and I am trying to give them a chance.

You think about it, and I would welcome any re-argument position you want to take on that issue which is fundamental, as I understand it, or indeed something less than fundamental.

MR. REBELL: If I could just take a moment. I am wondering what the implication of your granting defendants' motion in this matter is. Does that take it

to mean that at this point the entire plan with the recommendations of defendants for Part 5 on consultants is going to be adopted by the Court or is there going to be a further hearing or class action hearing or any other opportunity for additional commentary on the plan as a whole?

THE COURT: Well, now, wait a minute, Mr. Rebell. First of all, I think Mr. Cohen would say this resolves the final plan pretty much.

Right?

MR. COHEN: Correct.

* * *

[page 39]

THE COURT: Now, Mr. Cohen, I am going to just write a little memorandum endorsement granting the defendants' motion, denying plaintiffs' motion so that Mrs. Silvercan get in her motion to reargue if she wishes, and I think you do.

MRS. SILVER: Yes, your Honor.

THE COURT: All right.

* * *

[Transcript ends on page 42]

Memoranda Decisions of Judge Tyler, dated January 17, 1975, endorsed on the motions of plaintiffs (served January 3, 1975) and the Board of Examiners (dated December 20, 1974)

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Jan 1 1975
S.D. N.Y.

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January 14, 1975 487a

The within motion is granted for the reason dictated to the Court Reporter at the conclusion of the hearing today.

In essence, then, the plan as set forth in the appendix to the affidavit of Dr. Murray Rockowitz verified on December 20, 1974 is approved

Settle order is directed

H R TYLER
U S D J

LEGAL FILE

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NOTICE OF MOTION AND
SUPPORTING AFFIDAVITS

THE BOARD OF EDUCATION OF THE CITY
SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Defendants.

PLAINTIFFS

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MICROFILMED
MAY 1 1985

The preceding document is barely legible. We have read the original, and below the following is a true typed copy of Judge Tyler's Memorandum Decision. This typed copy is submitted for purposes of clarity.

January 14, 1975

The within applications are denied for reasons dictated to the court reporter at the conclusion of the hearing therein today.

It is so ordered.

s/ H.R. TYLER, Jr.
U.S. District Judge

Letter dated January 28, 1975 from Elizabeth
B. DuBois to Judge Tyler.

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January 28, 1975

The Honorable Harold R. Tyler, Jr.
United States District Judge
for the Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: Chance v. Board of Examiners
(70 Civ. 4141)

Dear Judge Tyler:

This letter is submitted pursuant to the Court's suggestion at the January 14 hearing, as plaintiffs' motion for reargument of the Court's ruling on the scope of "reporting and monitoring requirements" to be included in a final order. Plaintiffs respectfully request that the Court grant this motion and schedule reargument on that issue at its earliest convenience.

Preliminarily, we must request that the Court adjourn the date for settlement of defendants' proposed final order (served on plaintiffs without any prior discussion or forewarning last Friday afternoon) until such time as the Court resolves the issues raised by the present motion for reargument. In view of the Court's clear indication at the hearing that it would entertain such a motion before the submission of proposed counter-orders, the defendants' very submission of their proposed order at this time seems highly inappropriate. In any event, however, the settlement date clearly should be postponed to permit submission of orders reflecting the outcome of the motion.*

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* In view of our request to postpone settlement, we do not here discuss the problems raised by the defendants' proposed final order. We note, however, that they are not confined to the issue of adequate reporting. Among other things, (1) the proposal fails completely to resolve the problem posed by the continued existence of a Preliminary Injunction against the Board of Education

(continued next page)

Plaintiffs are not submitting a proposed order herewith partly in the belief that reporting provisions might better be included directly in a final order than buried, as both plaintiffs' and defendants' proposed provisions were, in Part V of the "Plan****for Licensing Supervisors" (hereinafter, the "Plan") which each submitted for approval to the Court in the January 14 motions. (Cf. Ex. A to Aff. Murray Rockowitz, December 20, 1974; Ex. A to Aff. Jeanne R. Silver, January 3, 1975). Another reason is our reluctance to encourage a repetition of what occurred in the prior written and oral arguments, when defendants obscured the gross deficiencies in their proposed reporting requirements by attacking the procedures and alleged unnecessary "detail" in plaintiffs' proposal.

The Court's comments at the hearing suggest that defendants succeeded in conveying a mistaken impression of both parties' position. Contrary to the statement of defendants' counsel, their proposal did not afford anything like a "reasonable" amount of data looking toward determination of whether they complied with the Court's Order or the Plan. Moreover, by virtue of its omissions, their proposal arguably would have authorized the withholding of much data crucial to such determination.

In a striking example, defendants' proposal omitted to provide for production of ethnic and racial data on the results of almost all tests. There was no conceivable justification for this omission in a lawsuit which successfully challenged the constitutionality of 50 examinations. As further discussed below, the virtual certainty that defendants' would fail to provide such information absent a court requirement guaranteed a plethora of new lawsuits encumbered by the same expensive and time-consuming efforts to develop and procure proof which preceded the injunction in this case.

Plaintiffs' can hardly be charged with seeking a "partnership" relationship with defendants in developing new examinations when they urge that the Court should require racial data on all tests and other information equally pertinent to the issue of compliance to be produced for their inspection. As we have from the beginning, we are simply asking for assurance that information sufficient in scope to permit such determination be furnished to plaintiffs regularly and at appropriate times so that such determination may be made promptly, routinely and without the necessity for litigation after destruction of records may have made the effort fruitless.

(from preceding page)
(Cf. Plaintiffs' Notice of Motion, January 3, 1975, para. 2), (2) improperly strikes paras. II A, IX and X of the original Orders of July 12, 1973 and (3) persists in the fiction that the "Plan" it would incorporate reflects the consent of the parties, despite plaintiffs' long-standing position that our assent was subject to agreement on reporting provisions and consulting firms.

To keep this issue in focus, we are avoiding discussion in this motion of the precise time frame of reporting procedures, the method for resolving disputes on compliance issues or other administrative matters. Such problems can be resolved in the settlement of an order once the scope of reporting provisions is defined. Our purpose in this letter is to demonstrate the gross deficiencies in the defendants' proposal and urge that the Court require at least the following four basic modifications in their plan.

I. The Requirements Should Mandate Submission of Information on the Validity and Non-Discriminatoriness of Step 2 Evaluation Procedures

A particularly serious omission from the defendants' proposed "Reporting Requirements" is the failure to require submission of any data whatsoever on Step 2 evaluation procedures for any positions. Defendants would have no duty to submit information regarding the development, substance, validation or outcome of this stage of the two-part licensing system, either before or after such evaluations were held.*

The "Plan****for Licensing Supervisors" which the Court has accepted on defendants' motion as a basis for developing new examination procedures makes the Step 2 evaluation a vital part of the new non-discriminatory licensing process. Since success on the evaluation is a condition to the issuance of permanent licenses, their job relatedness and lack of bias are crucial to the new licensing system's constitutionality. Thus, unless defendants are required to furnish validation and pass-fail data on Step 2, plaintiffs will have no way of determining whether the licensing procedures developed under the Plan avoid the deficiencies of the old system or simply reinstitute the discriminatory and non-job-related patterns invalidated by the Court.

II. The Requirements Should Mandate Submission At Least of Ethnic and Racial Data on Both Steps of All Examinations

Except with respect to the so-called "prototype" examinations, defendants' Reporting Requirements absolve

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* It cannot be maintained that the provision in Part V 4 for furnishing documents on "notice," which in any event pertains only to prototype examinations, supplies this omission. Having excluded such data from the scope of defined requirements, defendants can hardly be counted on to decide it is "relevant" later and furnish it voluntarily, particularly should the results turn out to evidence discrimination. In view of their present disparagement of such information, it is indeed doubtful that defendants will even develop or retain such information.

them from submitting any data at all. Thus, if their requirements become the sole reporting provisions in a final order, data related to only the first parts (see discussion, supra) of three examinations furnished after they are administered,* will be the only information available to plaintiffs for assessing the constitutionality of a sweeping new system covering 50 or more tests.

There is no basis for such an approach in the history of this litigation, where the Court struck down the defendants' licensing system on the basis of tests for all 50 positions and issued its injunction against all of them. Its most serious aspect is that even racial and ethnic data on pass-fail rates would not have to be revealed.

We know from experience in this very case that defendants oppose not only the submission but also the collection and preservation of information on the race and ethnic group of people who take their tests. They made this more than clear in the early stages of the litigation when they claimed on the basis of self-serving data that their old examinations had no discriminatory impact and then turned out to have no information establishing the truth or falsity of the claim.** It was only after an expensive and difficult survey entailing many disputes which this Court was forced to resolve, that data was obtained establishing the discriminatory character of the examinations.***

Not surprisingly in view of that history, the Final Judgment and underlying settlement followed usual practice in requiring (Para. VI) that data "showing the comparative

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* Even if the Court grants our request, infra, for advance submission of validation data on prototypes, and for information on Step 2 evaluations (supra), there is no guarantee that such information will be available before the administration of other examinations, since the Plan does not require the completion of any steps of the prototypical examinations other than job analyses before other examinations are initiated.

** Evidence that defendants still adhere to this position is suggested by their continuing failure to have submitted ethnic data on the so-called "III B" examinations. Although the written portions of those examinations were administered before the injunction herein, their completion entailed oral interviews in which defendants could presumably have applied routine procedures for collecting such data, if they had such routines.

*** The survey is discussed in Judge Mansfield's original opinion at 330 F. Supp. 203, 209.

performance of blacks, Puerto Ricans and whites" be collected, maintained and furnished to plaintiffs and the Court before the issuance of licenses based on the interim evaluation procedures. Plaintiffs submit that it would be contrary to sound principles of law and judicial administration to require anything less with respect to the pass-fail results of Step 1 and Step 2 tests administered under the new system, at least until data regarding a reasonable number of them has afforded reasonable assurance that continued implementation of the system will not repeat the pervasive pattern of de facto discrimination found by Judge Mansfield. Chance v. Board of Examiners, 330 F. Supp. 203, 209-14 (S.D.N.Y. 1971), aff'd 458 F.2d 1167 (2d Cir. 1972).

III. The Requirements Should Provide for Submission of Content Validation Data in Advance of Administering Step 1 and Step 2 Prototypical Examinations

We argued before the Court and in our papers the rationale for requiring as other Courts consistently have, that at least the apparent validity of the prototypical new tests be established before they are administered. In view of the decisions cited,* the provisions of Para. X of the Final Judgment and the strong practical considerations supporting this request, we submit that its rejection would be improvident.

We cannot conceive of a basis for distinguishing other cases in which Courts have granted similar relief. The Court here would appear to have been misled by the defendants' repeated emphasis on their "consent" to the Final Order and the alleged consent of all parties to the "Plan**** for Developing a New Licensing System.** Defendants' counsel

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* See Guardians Assn. of NYC Police Dept. v. Civil Service Comm. of NYC, 6 E.P.D. 8969 (2d Cir. 1973); Castro v. Beecher, 459, F.2d 725 (1st Cir. 1972), order on remand, 5 E.P.D. ¶8586 (D. Mass. 1973); Vulcan Society v. Civil Service Comm. of NYC, 6 E.P.D. ¶8974 (S.D.N.Y. 1973), aff'd, 490 F.2d 387 (2d Cir. 1973); Bridgeport Guardians Assn. v. Bridgeport Civil Serv. Comm., 354 F. Supp. 778 (D. Conn), aff'd, 482 F.2d 1333 (2d Cir. 1973); Carter v. Gallagher, 4 E.P.D. ¶7853 (D. Minn. 1972).

** Significantly, in all versions submitted to the Court, this document is captioned "Plan Proposed By the Board of Examiners, Board of Education and the Chancellor, for Licensing Supervisors in the New York City School System." This reflects two salient underlying factors: (1) the Plan is not a proposal of plaintiffs to which the defendants adhere but an outline drafted initially by defendants and (2) defendants' failure to agree with plaintiffs on reporting requirements and consulting firms abrogated essential preconditions to plaintiffs' concurrence.

spoke on the argument and in their papers as if this entire proceeding had been resolved by mutual assent to a series of new programs equally congenial to the parties. In fact the proceeding was hotly litigated and Judge Mansfield's original decision was based on what both Courts characterized as "extensive evidence". The defendants willingness to negotiate followed only upon extensive findings, conclusions and repeated iterations by lower and higher courts that of a "strong likelihood that plaintiffs would prevail" on the merits. See Chance v. Board of Examiners, supra, 458 F.2d at 1178. As recently stated by Judge Frankel in a related context, to treat such consent under such pressures as absolving defendants from otherwise normal obligations of losing parties in a constitutional case would be an invitation to "intransigent litigation" by plaintiffs. ASPIRA of New York v. Board of Education (S.D.N.Y. 72 Civ. 4002, Jan. 2, 1975, p. 5).

Defendants' "consent" to the Plan for the permanent new licensing system obviously was generated by the same pressures as their assent to the settlement. Were there any doubt of this, it would be set at rest by their blatant refusal to negotiate adequate requirements for reporting on their compliance.*

Finally, the Court's indication that the defendant Boards were somehow differentiated from the Civil Service Commission in comparable cases makes no sense whatsoever. Like the Board of Examiners, the civil service commissions' are in the business of developing tests and they do so not just for one but virtually for all city agencies.

Against the arguments of precedent and common sense, defendants' only argument for withholding test development data until after administration of tests has erected formidable barriers to their revision, is the alleged delay entailed in such procedure. This contention is belied completely by their own proposal to submit such data regarding Step 1 prototype examinations "promptly after examinations are held." (Part V 3(b), 5). If the data can be made available immediately after the examinations are given, it can clearly be made available before and may just as well be furnished at such time.

Plaintiffs have nevertheless acknowledged the practical burdens which might be imposed by advance submission of test validation data by asking that such data be furnished

* In itself, of course, the Plan is no assurance that the examinations developed will be constitutional. (Aff. Richard Barrett, annexed to Aff. J. R. Silver Jan. 3, 1975).

in advance only for each step of the three prototype examinations. Plaintiffs submit that this limitation of our request is a more than reasonable compromise of plaintiffs' right to be assured of the validity of defendants' approach to test development before administration of tests to hundreds of people imposes obstacles to their revision.

IV. The Requirements Should Include Record-Retention Provisions, Durational Limit and Provisions for Furnishing Certain Types of Information Not Directly Related to Test Development

One additional important problem, which epitomizes the perfunctory character of defendants' entire reporting proposal, is the omission of any provisions regarding duration, record-keeping or other regular reporting on their obligations under the Plan.

Virtually "boilerplate" in cases of this kind, record-keeping provisions can certainly not be omitted in this case without jeopardizing the continued existence of data necessary to determine compliance with the Court's decree. The vague and incomplete character of defendants' proposals makes such a provision particularly necessary since they would otherwise afford little basis for assuring the preservation of racial and ethnic data, general information on test development and information on compliance with defendants' other obligations under the Plan.

The Plan in fact imposes on defendants a number of such other obligations not specifically related to the development of tests but very material to the creation and maintenance of a non-discriminatory licensing system. Thus, the Examiners are required to improve the training and racial balance* of their staff who would administer tests and evaluations, (Part III F). In order to open up the system to more members of minority groups, they are required to make specific efforts to increase the frequency with which tests are administered (Part III C) and cut down the number of different tests for different jobs (Part I, 2, 3). The Board of Education is required to contribute to the latter process by seeking to ascertain common elements in different jobs and combining job titles susceptible of assessment in the same tests.

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* Judge Mansfield found that there was a "'serious and substantial question' as to whether discrimination against Blacks and Puerto Ricans is not being unconsciously practiced by white interview examiners."

It would be completely unreasonable to exempt the defendants from an obligation to report on their compliance with these important duties, since in the absence of such reporting it is hard to imagine how anyone could determine whether they had complied or not. We also submit that time schedules for furnishing such data must be established if there is to be any chance of avoiding the defendants' repeated delays and appeals to the Court which have characterized performance of obligations under the interim licensing system. Those problems have arisen in the face of mandatory deadlines; certainly the situation would be worse in their absence.

CONCLUSION

Plaintiffs submit that the above discussion demonstrates the complete insufficiency of defendants' proposed reporting requirements. We therefore respectfully request that the Court grant our motion for reargument of its July 14 ruling endorsing those proposals for inclusion in the final order, and after appropriate further proceedings, issue a new decision requiring settlement of an order containing at least the additional requirements set forth above.

Sincerely,

Elizabeth B. DuBois

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Jeanne R. Silver

JEANNE R. SILVER
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cc: Leonard Bernikow, Esq.
Saul Z. Cohen, Esq.

Memorandum Decision and Order of Judge
Tyler, dated February 4, 1975

LEGAL FILE

RE: Beatus M. Chance et al. v. The Board of Examiners et al., 70 Civ. 4141 MRT

On January 14, 1975, after a hearing, this court granted in substantial part the motion of defendants to settle a plenary examinations plan for the selection and licensing of supervisors in the City school system. Thereafter, with the permission of the court, plaintiffs' counsel submitted an application by letter to rehear the terms and conditions of the plan.

Unfortunately, the motion for reargument submitted by plaintiffs does not specify precisely how they would like the order to read. Their letter leads me to believe, however, that the plaintiffs may have some specific ideas worthy of consideration. Accordingly, the motion for reargument filed by plaintiffs is granted, and plaintiffs' counsel are directed to serve and file a proposed counter order with the changes, recommendations, and amendments which they feel are appropriate. This counter order should be in the classic form with as much specificity regarding reporting as possible - particularly with respect to the types of data to be collected and maintained, what should be reported to

plaintiffs and others, when reports should be made, and how plaintiffs should proceed if they determine, on the basis of the reports, that the defendants are acting inappropriately. In the meantime, this court will withhold in abeyance the enactment of the proposed order, which was apparently filed by defendant counsel in the Anchorage Office on January 24th but not received by the undersigned until January 31, 1975.

Plaintiffs' proposed opinion order should be served and filed no later than February 11, 1975. It is so ordered.

Dated: February 4, 1975

J. R. Taylor IV
U.S.D.J.

The preceding document is barely legible. We have read the original, and the following is a true typed copy of Judge Tyler's Memorandum Decision. This typed copy is submitted for purposes of clarity.

RE: Boston M. Chance et al. v. The Board of Examiners et al., 70 Civ. 4141 HRT

On January 14, 1975, after a hearing, this court granted in substantial part the motion of defendants to settle a plenary examinations plan for the selection and licensing of supervisors in the City school system. Thereafter, with the permission of the court, plaintiffs' counsel submitted an application by Letter to rehear the terms and conditions of the plan.

Unfortunately, the motion for reargument submitted by plaintiffs does not specify precisely how they would like the order to read. Their letter leads me to believe, however, that the plaintiffs may have some specific ideas worthy of consideration. Accordingly, the motion for reargument filed by plaintiffs is granted, and plaintiffs' counsel are directed to serve and file a proposed counter order with the changes, or emendations, and amendments which they feel are appropriate. This counter order shold be in the classic form with as much specificity regarding reporting as possible - particularly with respect to the types of data to be collected and maintained, what should be reported to plaintiffs and

others, when reports should be made, and how plaintiffs should proceed if they determine, on the basis of the reports, that the defendants are acting inappropriately. In the meantime, this court will hold in abeyance the supplement of the proposed order, which was apparently filed by defense counsel in the Clerk's Office on January 14th but not received by the undersigned until January 31, 1975.

Plaintiffs' proposed counter order should be served and filed no later than February 11, 1975.

It is so ordered.

Dated: February 4, 1975

s/ H. R. TYLER, JR.
U.S.D.J

Letter dated March 10, 1975, from Leonard Bernikow to Judge Tyler

LAW DEPARTMENT
MUNICIPAL BUILDING
NEW YORK, N. Y. 10007
W. BERNARD RICHLAND,

504a

March 10, 1975

Hon. Harold R. Tyler, Jr.
United States Distsrict Court
Southern District of New York
United States Courthouse
Foley Square
New York, New York 11201

Re: Chance v. Board of Examiners
70 Civ. 4141

Dear Judge Tyler:

Plaintiffs by their motion of January 3, 1975 for modification of the final judgment, sought to have the consent judgment of July 12, 1973 entered against the Board of Education. The theory behind plaintiffs' motion is that the Board of Education has not sought a trial of the merits in this proceeding. It should be noted that the burden is on the plaintiffs to bring an issue to trial and they have not sought to do so. Nonetheless the Board of Education would consent to the entry of the consent judgment previously entered against the Board of Examiners on July 12, 1973.

The Board of Education, however, opposes plaintiffs' proposed counter order, noticed for settlement for February 13, 1975.

Respectfully yours,

Leonard Bernikow
Assistant Corporation Counsel

cc: Jeanne R. Silver, Esq.
Saul Z. Cohen, Esq.

Order of Judge Tyler (plus exhibit), dated
March 25, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

U.S. DISTRICT COURT
FILED
MAR 25 1975
S. D. OF N.Y.

BOSTON M. CHANCE,
LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.
----------X

ORDER MODIFYING FINAL JUDGMENT AND ORDER

70 Civ. 4141 HRT

WHEREAS, on July 12, 1973, this court entered a Final Judgment herein against defendant Board of Examiners, its members, and defendant Chancellor of the City School District of the City of New York based upon a Stipulation of Settlement with the plaintiffs, approved by the court; and

WHEREAS, defendant Board of Education, its members, and the Deputy Superintendent of Schools did not consent to the said Stipulation of Settlement, and plaintiffs moved for a default judgment or, in the alternative, an order modifying the outstanding Preliminary Injunction against all defendants, and the court on July 12, 1973, issued an order against them modifying the Preliminary Injunction to require that they adhere to the terms of the aforesaid Final Judgment against the other defendants pending the determination of this action; and

WHEREAS, paragraphs III and VI of the July 12, 1973 Judgment and Order authorized defendants to administer an interim examination system pending development of a Plan for a permanent system for the selection and licensing of supervisors in the New York City School System, and paragraphs . . . X provided for modification of said Judgment and Order to permit the implementation of such a Plan, and the administration of plenary examinations for supervisors; and

WHEREAS, all parties herein agreed upon a Plan for such plenary examinations, except that they did not agree on the method for choosing the consultants to be used by defendants under the Plan and they did not agree upon a reporting provision, and they submitted the Plan to this court on May 24, 1974; and

WHEREAS, all the defendants moved this court on December 20, 1974, for an order modifying the aforesaid Final Judgment and Preliminary Injunction to permit the development and implementation by defendants of a permanent new licensing system in accordance with the aforesaid Plan (with certain modifications); and

WHEREAS, the plaintiffs moved the court on January 3, 1975, to issue an order permitting the development by defendants of a permanent new licensing system in accordance with the Plan (with modifications proposed by their counsel), and, further, to issue a Final Judgment against the defendants Board of Education, its members, and the Deputy Superintendent of Schools; and

WHEREAS, the court has received a letter dated March 10, 1975, from the Board of Education indicating its consent to the entry against it of the Final Judgment of July 12, 1973, previously entered against the Board of Examiners; and

WHEREAS, this court considered the motion papers submitted by defendants, the motion papers and memorandum of law submitted by plaintiffs, and the reply affidavits submitted by defendants; held a hearing on January 14, 1974, at which time it heard argument from counsel for defendants and counsel for plaintiffs; and, being fully advised, rendered its oral decision on January 14, 1975; and

WHEREAS, this court has considered plaintiffs' letter of January 28, 1975, as a motion for reargument of the decision of January 14, 1975, and has determined to grant that motion in part, having also considered defendant Board of Examiners' memorandum opposing plaintiffs' reargument motion and proposed counter-order; and

NOW, THEREFORE, the court having received orders and counter-orders relevant to these matters submitted in connection with the parties' motions and prior proceedings herein, it is hereby ORDERED that:

I. Defendants' aforesaid motion is hereby granted as hereinafter modified and is in all other respects denied.

II. Plaintiffs' aforesaid motions are hereby granted, as hereinafter indicated, and are in all other respects denied.

III. This court's Final Judgment of July 12, 1973, against the defendants Board of Examiners, its members and the Chancellor of the City School System, and its Order of the same date against the defendants Board of

Education, its members and the Deputy Superintendent of Schools modifying the Preliminary Injunction theretofore issued, are modified as hereinafter provided.

IV. As of the effective date of this Order, the provisions of the Final Judgment of July 12, 1973, as modified, shall apply fully to all of the defendants, and all the defendants shall be bound thereby.

V. Except to the extent inconsistent herewith, the provisions of the aforesaid Final Judgment shall continue in full force and effect as against all of the defendants.

VI. The Plan for a comprehensive system of plenary examinations for supervisors in the New York City School System which was annexed as an exhibit to the affidavit of Murray Rockowitz, sworn to December 20, 1974, and a copy of which is annexed hereto and made a part hereof (the "Plan"), is approved as herein modified, and, notwithstanding any other provision in the July 12, 1973, Judgment and Order, defendants are permitted and authorized to develop examinations for supervisory positions and thereafter to administer and conduct such examinations, to process and grade such examinations, to promulgate eligible lists and to issue licenses based upon such examinations, all in accordance with that Plan.

VII. For a period commencing with the date of this Order and ending two years after permanent licenses have been promulgated for all of the positions defined as "prototypical" in the annexed Plan, defendants shall comply with the following provisions for collecting, maintaining and furnishing data to plaintiffs' counsel:

A. Defendants shall collect and maintain, or, if defendants prefer, turn over to plaintiffs the following data:

1. Job analyses prepared for all supervisory positions, with underlying data and any interim reports generated and used in their preparation.

2. Step 1 tests and full descriptions of all Step 2 evaluation procedures for all supervisory positions, with scoring sheets, assessment profiles and manuals on use of results.

3. All validation studies and other data including but not limited to documents showing the relationship of test elements and procedures to behavior elements in job analyses, relevant to determining the validity and job-relatedness of all Step 1 examinations and Step 2 evaluation procedures.

4. Full information on the ethnic and racial character (black, Puerto Rican or Latin American descent or origin, white) and on the qualifications of examination assistants or other personnel who administer the Step 1 tests and Step 2 evaluations, respectively, for each supervisory position.

5. Analyses with respect to each Step 1 test and Step 2 evaluation for each position of the number of applicants for each, their race/ethnicity (black, Puerto Rican or Latin American descent or origin, white); and the number of applicants actually participating in each, their race/ethnicity, and the pass-fail results of each, specifically showing the comparative performance of blacks, persons of Puerto Rican

or Latin American descent or origin and whites.

6. All other data, studies, analyses and reports relevant to the development and implementation of the Plan and generated in the course of development or implementation.

B. As each job analysis for one of the three prototypical positions is completed, defendants shall permit plaintiffs access to it and to all reports and other information furnished by the consultant to defendants bearing on the procedures followed in conducting it and the soundness of its conclusions.

C. Defendants shall not announce or conduct any Step 1 test or Step 2 evaluation for any of the three prototypical positions on any date less than two weeks after plaintiffs have been afforded all the information and opportunities provided for in paragraph X of the July 12, 1973 Final Judgment. Defendants shall notify plaintiffs of their intention to administer tests and evaluations for other than prototypical positions at least two weeks before they are conducted.

D. All material to be collected and maintained pursuant to this paragraph shall be made available to plaintiffs' counsel for inspection as soon as is practicable after its collection but, in any event, within three weeks after its collection.

E. In the exercise of its continuing jurisdiction pursuant to Paragraph XIV of the Final Judgment of July 12, 1973 herein the court shall

entertain appropriate applications for attorneys' fees and such Orders as may be necessary to protect the privacy of individuals or the confidentiality of test questions or of hear challenges as to the constitutionality of any new test which is implemented.

Dated: New York, New York
March 25th, 1975

U.S.D.J.

Plan Proposed by the Board of Examiners, Board of Education and the Chancellor, for Licensing Supervisors in the New York City School System.

513a

Introduction

This proposal outlines a procedure for the development of examinations by the Board of Examiners to fulfill its statutory responsibility to provide examinations for the licensing of supervisors on the basis of "merit and fitness" through the use of "open qualifying" examinations. To achieve this objective the proposal provides for:

(1) Job analyses of all supervisory positions;

(2) Development of job-related examinations which shall consist of the following essential steps - -

Step 1 shall consist of a comprehensive assessment program, whose results shall be scored and reported in a manner more useful to the new Community School Board type of administration and which shall result in the provisional licensing of all eligible applicants except those who fail to meet levels of minimum acceptable performance.

Step 2 shall consist of an on-the-job performance evaluation of persons who have served with provisional licenses, and shall result in the permanent licensing of those found to have performed reasonably.

(3) A procedure for validating examinations.

The goals of the proposed program are:

(1) to develop non-discriminatory personnel selection policies without abandoning the essential elements

EXHIBIT A

of a merit system;

(2) to build in performance evaluation as a key component of the licensing process;

(3) to insure employing authorities a broad choice among qualified applicants.

Accordingly, the primary purposes of the Board of Examiners' evaluation at Step 1 are to screen out those who fail to meet levels of minimum acceptable performance, and with respect to all other applicants to provide community board and Central Board of Education hiring authorities with the maximum useful information possible so that they will have an informed basis for making decisions regarding the selection of those most highly qualified for service in their particular schools and districts.

I. Job Analysis

1. The Board of Education, in consultation with the Board of Examiners and other interested persons and groups, will develop job analyses for all positions for which the Board of Examiners is required to conduct examinations. The job analysis will be based on a determination of the job behaviors which include the tasks the person is called upon to perform, the amount of time devoted to these tasks, their relative importance, and the knowledge and skills which enable a person on the job to perform these tasks successfully. The proposed procedure should be viewed as a model for analyzing all jobs although specific procedures might differ for specific

obs. As a general rule, the job analysis will be developed rom data which will be accumulated in the following way:

A. One resource in developing the job analysis will be analytic descriptions of the handling of such jobs by incumbents presently serving in such positions. To utilize this resource observers selected by the Board of Education who have a background in the specific license area and/or are trained in job analysis (could be non-pedagogues) will be trained and periodically retrained in observation techniques. These observers will visit school sites to observe incumbents in the position to develop descriptions of the work they are performing. Sufficient numbers of all-day visits will be made to the schools over representative periods to insure that the description includes both daily and periodic tasks. Observers will be required to record all tasks performed by incumbents indicating not only a description of the task but the time allotted to each and to indicate the relative importance of the described behavior in terms of effective performance. To insure that the analysis includes consideration of the widely varying schools and districts in the City of New York, the sampling will include incumbents in schools located in districts of varying socio-economic levels. Any other steps necessary to assure meeting the differing needs of various

districts will be fully considered. 516a

B. Observed incumbents will be asked to provide the Board with a log of their activities in the job.

C. Incumbents' logs will be compared with the observers' logs developed in accordance with (A) above. The incumbent's supervisor will evaluate both the observer's log and the incumbent's description to determine the relative importance of the described behavior in terms of effective performance. The job description will incorporate observed and reported data, together with the supervisor's judgments.

D. The Chancellor, Community Superintendents, Community School Boards and/or Parent Associations will be consulted as to their perceptions of the job. Such perceptions shall be considered in the development of the job description.

E. As a further effort to insure the soundness of the job analyses, the Board of Education will subject each analysis to review by the following:

1. A Community Superintendent or Central School Superintendent.
2. A college or university specialist in the relevant area.
3. A personnel specialist from outside the New York City School System.
4. An incumbent supervisor in the relevant category.

5. A Community School Board representative designated by the Chancellor.

Where there is an appropriate group which is representative of any of the aforesaid categories, the Board will seek designees from such group. However, the final selection shall be by decision of the Board of Education.

The designees shall review each job analysis and shall make recommendations to the Board concerning same. The decision of the Board of Education, however, shall be final.

2. Based on the data developed in "1" above, the Board of Education shall prepare a job analysis and description for each position for which examinations are to be conducted. This job analysis shall set out and fully elaborate all of the important qualities and/or behaviors necessary for performance of the job. It shall also indicate the relative importance of the various qualities and behaviors and the degree of significance each has in determining overall effective performance. In drawing up these analyses the views of incumbents, their supervisors and those persons consulted pursuant to "D" above, as well as pertinent research literature shall all be taken into account.

The Chancellor and the Board of Education will also utilize the process of developing job analyses to review existing job titles, combining titles and/or creating new titles, where appropriate.

As a further aspect of preparing job analyses every effort will be made to identify common elements in jobs which might lend themselves to assessment in a common test. Similarly,

[illegible] job analyses every effort will be made by the Board of Examiners to identify common elements in jobs which might lend themselves to assessment in a common test.

In order to insure broad public acceptance as to the objective implementation of the procedures set forth herein and in "1" above the Board of Education will retain a recognized consulting firm to develop and prepare the first three job analyses as prototypes pursuant to the procedures set forth herein and in "1" above and/or such other procedures as the firm deems appropriate. The prototype analyses shall cover the positions of Principal - Elementary School, Assistant Principal - High School (Supervision), and Assistant Principal - Elementary and Junior High. These positions cover the largest number of people in the supervisory categories, thus permitting the program to start in a meaningful way. These analyses will thereafter serve as models for future job analyses to be developed by the Board of Education. In doing these analyses the consulting firm shall be guided by the goals described supra of identifying common elements in jobs which might lend themselves to assessment in a common test, and of reviewing existing job titles with a view toward making recommendations to the Chancellor and Board of Education regarding the combination of titles and/or creation of new titles, where appropriate. The consulting firm shall also recommend a program for the selection and training of persons, to conduct subsequent job analyses. The Board of Education has designated American Institutes for Research, 3301 New Mexico Avenue N.W., Washington, D.C. 20016, as its consultant in connection with the development of job analyses for prototype

examinations. The Board of Education, in its discretion, may use consultants to perform services in the development of future job analyses.

3. The Board of Examiners will determine the feasibility of the development of tests for families of jobs that require similar qualities and behaviors. It would then be possible for similar tests to be administered for a group of jobs that call for similar knowledges, skills and behaviors. The Board of Examiners, in its discretion, may use consultants to perform services in this connection.

The Board of Examiners will develop examinations based on the aforesaid job analyses which measure the applicant's capacity to perform the significant job requirements as indicated by the analysis. This examination process will be divided into two steps. Step 1 will consist of a series of tests to be given to all eligible applicants for the primary purpose of evaluating the applicants' strengths and weaknesses. All persons who meet levels of minimum acceptable performance under Step 1 shall be declared eligible for provisional appointment to the position in question. Step 2 of the examination process will be administered to those persons who secure such provisional appointment. It shall consist of an on-the-job performance evaluation at the end of one school year of provisional service. Any person found to be performing reasonably in the Step 2 evaluation shall be awarded a permanent license for the position in question.

A. Description of Step 1 Tests

A variety of tests may be used at this stage. They may or may not include written examinations, depending on the needs of the particular situation and the nature of the qualities being evaluated. These Step 1 tests are likely to include some combination of the following:

1) Situational tests or job simulations - tests which place the applicant in a realistic job setting and call upon him to exhibit appropriate behavior. Thus, if administrative ability is a job requirement, an in-basket test may be used. This test uses a hypothetical but realistic in-basket containing letters, memoranda, records

of incoming telephone calls and other documents normally found in the in-basket of the school administrator. The applicant is given the necessary background information concerning the school in which, as principal, he would be faced with the specific in-basket. He is told that he is the incumbent principal and that he must respond to the materials as he would actually respond on the job by

a) handling certain matters himself immediately
b) handling others himself at a later time
c) delegating some to staff for immediate action and
d) delegating others to staff for later action.

After a period of study of the documents, he may be asked in an interview to give the reasons for the decisions he has made in handling the in-basket and to defend them.

2) Job knowledge tests - written and/or performance tests which measure the applicant's knowledge of subject matter required by the job. Thus an applicant for the position of Assistant Principal Supervision (Mathematics) D.H.S. might be required to demonstrate a knowledge of the curriculum and materials of his subject to the extent that the job analysis identifies that knowledge as important to the performance of the job.

3) Tests of communication skills - written and/or oral tests which will require the applicant to

demonstrate his ability to write and speak effectively to students, staff, parents and the community.

4) Tests of special experience - tests designed to give an applicant the opportunity to demonstrate his knowledge of special areas that may be deemed important by particular Community School Boards, e.g., knowledge of a foreign language or knowledge of the culture of a particular ethnic group.

5) Physical and medical test.

6) Inspection test - evaluation of the performance of an applicant on the job currently held. Every effort will be made to include such evaluations in the Step 1 assessment, although considerations of cost may preclude extensive performance evaluation in some examinations involving large number of applicants.

In order to insure that tests are job related, they will be created by closely matching the tests and test tasks to the important elements of behavior on the job as identified in the job analysis. The job analysis will be reviewed and selected behaviors listed will be translated into test tasks. The sampling of test tasks will reflect in microcosm the complex conditions of the job itself. Each test item in a written test and each test, be it interview or simulation, will be identified by a code referring to a specific item on the job analysis. This cross reference system will insure that test tasks used will be based on the job analysis. Test items will reflect the relative importance assigned to the task in the job analysis.

B. Reporting of Results of Step 1

In the past, specific weights were attached to each one of the battery of tests with a few exceptions (written English, physical and medical, and records were rated either satisfactory or unsatisfactory). A candidate had to achieve a weighted average of 60 per cent on the battery of tests to pass. If a candidate scored less than 50 per cent on any part of the examination, he was eliminated. If he obtained 50 per cent or more, he was continued in the examination but he had to compensate for marks lower than 60 per cent because he had to achieve a weighted average of 60 to pass.

To adapt the testing system to the needs of a Community School Board type of administration, test results will be reported in a manner completely different from heretofore. Instead of a composite grade, a profile of performance will be made available to the Central Board or to Community School Boards, whichever has jurisdiction, for each qualified candidate. This profile will present an assessment of the performance of each qualified candidate in all tests without specific weight and without exact composite numerical grades.

The assessment will also include a narrative report of the candidate's performance in the various areas tested as previously determined by the job analysis. For example, the assessment of a candidate in a principal's examination might report on the following areas:

1) managerial abilities (e.g., handling of a variety of problems by proper organization, planning, imagination and decision-making);

2) supervisory abilities (e.g., competency to observe classroom teaching insightfully and

to contribute to the improvement of teacher performance); 524a

3) interpersonal relationships (e.g., communications skill, sensitivity to the role of participants in a crisis situation, awareness of the human factors operative in a school setting).

The standards for assessment of performance on each test will be established by experts chosen by the Board of Examiners in the areas covered and assessments in accordance therewith will be made by examiners chosen for their expertise in the area covered by that test. Thus, in evaluating performance on an administrative in-basket, examiners will be drawn from a pool of experienced administrators in education and industry who will have participated in the job analysis or who will be familiarized with the adminstrative component of that analysis. The Board will include, where available, as assistant examiners and examination assistants qualified personnel, from the varied racial and ethnic groups represented in the New York community. The examiners will rate performance in accordance with a scoring guideline that will identify the significant elements in the in-basket and levels of minimum acceptable performance based on the guideline.

Similarly, in a supervisory simulation, standards and the level of minimum acceptable performance would be set by pooling expert opinion of those who had wide experience in supervising instruction in a variety of schools and who were thoroughly familiar with the content and methodology of the curriculum areas involved. They would view a representative videotaped lesson, and identify significant areas of strength

and weakness in the performance of the teacher conducting 525a
the lesson and specific ways in which that performance could be improved. The candidate would appear before one of a number of panels of examiners consisting of school supervisors, university professors or other experts in supervision familiar with the specific subject area and would evaluate the lesson and present a program he would seek to implement to improve the teacher's performance.

No assistant examiner or examination assistant shall participate in the administration of any test without having first received appropriate training.

A sample profile format follows on the next page.

Sample Assessment Profile Format

(The tests indicated are merely examples of those which might be used. Total assessment is not restricted to these examples.)

	Unqualified-	Qualified--	Highly Qualified---
Understanding of Essential Principles of Administrative Behavior (as measured by "in-basket" situations)			
Ability to Evaluate Observed Classroom Teaching and to Effect Improvement (as measured by response to actual teaching)			
Understanding of Human Relations Principles Involved in School Management (as revealed by reaction to taped situations)			
Understanding of the Educational Process in the Urban Setting (as revealed in a written test on educational literature - for entry level as chairman or assistant principal)			
Communications Skills: Ability to Communicate to Staff, Students, Community (as revealed in simulated tasks)			
Skills in English Communication (as revealed in a writing sample - for entry level as chairman or assistant principal)			
Inspection Test			
Physical and Medical Test			
Record, Including character and evaluation of past experience (including fingerprint check required by Board of Education)			
Special Skills Tested at Applicant's Request (e.g., knowledge of Spanish)			
Special Experience (identified from vita supplied by applicant and verified by the Board of Examiners)			

It can be seen from this sample profile that, though the candidate is qualified overall, he is unqualified in one of the areas tested. In the event that the performance of the applicant is determined not to meet the level of minimum acceptable performance in an area deemed essential by the job analysis, he would be rated unqualified and not recommended for licensing and a place on the qualified list. This level of minimum acceptable performance shall be set with a view toward screening out the unqualified, consistent with the primary purposes of the Step 1 evaluation which are to ensure employing authorities the broadest possible choice among qualified applicants, and to provide with respect to such applicants the maximum useful information possible so that the employing authorities will have an informed basis for making decisions regarding the selection of those most highly qualified for service in their particular schools and districts. A rating of unqualified in one or more areas not deemed essential by the job analysis would not prevent the applicant from being placed on the qualified list, although said ratings would of course be reflected in the applicant's assessment profile.

Upon receipt of the list of qualified eligibles, together with their assessment profiles and narrative report, each Community School Board could evaluate the indicated achievement levels of each eligible in the lights of its own needs, attaching more importance to some aspects of the total assessment and less importance to others. Thus, a candidate who did poorly in English communication but well in administration and supervision might be more acceptable

to one Community School Board than to another. Another aspect of the profile would be the evaluation of additional skills claimed by the applicant; thus, an applicant who claimed fluency in Spanish would be tested for that skill and this additional qualification will be reported together with the other aspects of his assessment.

The Board of Examiners would undertake to provide a manual to help Community School Boards interpret the results reported and would consult upon request with any Community School Board in matters of personnel selection. Further, in the case of applicants whose assessment profiles did not include adequate evaluations of prior performance, the Board would provide additional assessment service. Each Community School Board could submit to the Board of Examiners a list of reasonable length of qualified persons in whom they were interested for a particular supervisory position, for an assessment of their performance in the job they currently hold. The Board of Examiners would evaluate by an on-the-site inspection by a team of experts each eligible as to performance in his current job, wherever he may be serving, and submit a report of its findings to the Community School Board.

C. Frequency of Step 1 Examinations and Establishment of Continuing Eligible Lists for Persons With Provisional Licenses

The parties agree to, and any settlement agreement is conditioned upon, the entry of a remedial order by the Court providing that, in order to maximize the opportunity for qualified minority applicants to compete for supervisory positions:

1. The Step 1 screening process for any particular examination shall be completed as quickly as is administratively feasible.

2. Step 1 examinations for every separate job title for which there are vacancies shall be ordered by the Chancellor in connection with the Community School Board Consultative Council as frequently as it is administratively feasible for the Board of Examiners to give such examinations and it appears appropriate, in order to insure employing authorities the broadest possible choice of qualified applicants. In any event, said examinations shall be ordered and given whenever the number of persons with provisional licenses on an existing list falls to 50% of the number on the list at the time of its establishment.

3. Successful candidates for provisional licensure shall have their names added to, and shall remain on, eligible lists for a period of four years.

The provisions of paragraphs"1" through "3" above shall be effective for a period of 5 years from the date of the announcement of the last prototype examination, notwithstanding any provision to the contrary contained in any law, regulation or collective bargaining agreement, including specifically N.Y. Educ. Law § 2590-j.4.(f).

The announcement of examinations by the Board of Examiners shall not precede the giving of such examination by more than six weeks.

D. Phasing Out of Interim System of Licensing on Basis of Performance Evaluation and of Interim System of Filling Vacancies

1. With respect to each supervisory job title, the interim system of licensing on the basis of performance evaluation established pursuant to this Court's orders of July 12, 1973, shall continue in effect for each job title until:

a) The promulgation of an announcement of an examination for that title by the Board of Examiners at which time the interim system of evaluation for such title shall forthwith cease, provided, however, that all persons eligible for performance evaluation whose applications for such evaluation are filed prior to the date of said announcement, shall be evaluated pursuant to the interim system of performance evaluation and, where appropriate, licensed.

b) If no announcement of examination is made for any particular job title, the interim system of performance evaluation shall cease on the later of the following dates:

(1) The expiration date of any existing eligible list for a particular job title

(2) one year from the date of the announcemen by the Board of Examiners of the last of the aforementioned three prototype examinations.

Notwithstanding the foregoing provisions of this subparagraph (b), all persons eligible for performan evaluation whose applications are filed prior to the later of the aforesaid dates, shall be evaluated

pursuant to the interim system of performance evaluation and, where appropriate, licensed. 531a

2. Pending the promulgation of a list of persons provisionally licensed for a particular job title pursuant to Step 1 hereof, vacancies in such title shall continue to be filled in accordance with the provisions of Paragraph VIII of the July 12, 1973 orders of this Court, provided, however, that licenses shall not be granted to persons filling such vacancies in accordance with the performance evaluation procedure except as provided in paragraph "1" above.

3. Upon promulgation of a list of persons provisionally licensed for a particular job title pursuant to Step 1 hereof, the interim system of appointment to positions in such title described in Paragraph VIII of the orders of July 12, 1973 shall forthwith cease.

E. Description of Step 2 Test

This step shall consist of on-the-job performance evaluation, after one school year of service, of any person given a provisional appointment after qualifying under Step 1. A candidate will be rated satisfactory under Step 2 if he demonstrates reasonable performance on the job and will then be awarded a permanent license for the position in question.

The on-the-job evaluation will assess the candidate's performance in terms of the essential elements of the job analysis through such activities, for example, as the following: classroom visits and a study of the applicants' efforts to improve teacher performance (e.g., post-observation

conferences and reports, workshops, inter-visitation program, and demonstration lessons); interpersonal relations with staff and students (as evidenced, e.g., in staff meetings, consultative council meetings, and meetings with student government officers); relations with parents and community (as evidenced, e.g., in planning parent meetings, in involving community persons in advisory capacities, in using community resources in the instructional program); discussion with the applicant and his supervisor concerning the goals of the school, major problems that the applicant has faced in achieving these goals, and steps he has taken to solve these problems and provide a wholesome school environment and an effective instructional program.

The panel conducting the evaluation will, in assessing the applicant's performance, consult with a broad cross-section of persons familiar with the applicant's work. For example, in the case of an elementary school principal, this would normally include the candidate's supervisors, his fellow administrators, teachers working under him, students and parents, as well as any persons designated by the community superintendent or the community board.

F. Staff

The Board of Examiners shall have as a major goal the development of a full time, permanent staff of persons drawn not only from education, but from such other fields as testing and measurement and private industry, as well as the use of examination assistants from outside the educational profession. The Board shall develop and publish appropriate written selection criteria for both assistant examiners and

examination assistants and shall develop appropriate training procedures for such staff.

No member of the staff shall participate in the administration of any test without having first received appropriate training. Both assistant examiners and examination assistants shall include, where available, qualified personnel from the varied racial and ethnic groups represented in the New York community and from outside the education profession. Nothing contained herein shall be deemed to contravene the provisions of Section 2659 of the New York State Education Law regarding the nomination or approval by the Chancellor or Community Superintendent of examination assistants.

C. Appeal Procedures

The program described above will continue the same safeguards that are currently in effect, namely, the right of the applicants to full disclosure of the guidelines used in the assessment process with the right to appeal from any or all of the findings at both Step 1 and Step 2. Such appeal shall be made in accordance with Section 13 of the By-Laws of the Board of Examiners (copy of which is attached hereto) and may challenge any aspect of the examination including whether the examination is consistent with the general standards and procedures for testing at Step 1 and Step 2.

The Board of Examiners will apprise applicants of their right to appeal, of the procedures to be followed, and of the procedures available to obtain review of any appeal denied by the Board of Examiners.

III. Validation

The Board of Examiners will develop procedures to validate Steps 1 and 2 and the testing program on an on-going basis. In order to assure that these validation procedures are properly developed and performed, the Board of Examiners shall designate Development Dimensions, Inc., Suite 419, 250 Mount Lebanon Boulevard, Pittsburgh, Pennsylvania 15234, as its consultant or consulting agency to design and conduct validation studies of the examinations for the three prototype positions referred to in Section 1 supra. In carrying out its task the consultant or consulting agency shall be directed to design and implement validation procedures which are consistent with applicable law. The procedures so developed will serve as a model for subsequent validations, as appropriate.

The testing process shall be revised as necessary to make it consistent with the findings of the validations.

IV. Licensing Procedure

Candidates who are found to be qualified as a result of the Step 1 procedures described above shall be placed on an "eligible list" promulgated by the Board of Examiners and certified to the Division of Personnel of the Board of Education. Persons on such a list shall be eligible for provisional appointment to the jobs for which they have been tested. Once such a list has been established, appointing authorities shall be free to fill supervisory vacancies with persons who possess such provisional licenses or with persons who possess licenses granted pursuant to the interim system of performance evaluation or with persons who possess licenses granted pursuant to the previous system of examination.

after service in such job for one school year the provisional appointee must be evaluated in accordance with Step 2 hereof. The candidate is found to have performed satisfactorily in accordance with the Step 2 on-the-job evaluation described above, shall be licensed. The Step 2 evaluation shall be completed within the semester following the required school year of provisional service.

V. Reporting Requirements

A. For the purpose of determining or securing compliance with the Final Judgment, and for no other purpose, and subject to the entry of an appropriate protective order, the defendants will provide the following information with respect to the three prototype examinations described above in this Plan at the times indicated below:

1. Job Analyses

~~Upon completion~~ No material relevant to each of the job analyses, so generated or collected the Board of Education will ~~submit~~ make it and the Consultant's report available for inspection ~~to plaintiffs' counsel and to the Court,~~ and comment by plaintiffs' counsel.

NPIJ

2. Development of Step 1 examinations

~~Upon~~ Ten (10) days before the announcement of the holding of a prototype examination, the Board of Examiners will provide plaintiffs' counsel and the Court with a description of the scope of the examination and will make available for inspection by plaintiffs' counsel all material indicated in Paragraph I of the Court Judgment of July 12, 1973.

NPIJ

3. Administration of Step 1 examination

(a) Copies of the examination announcement will be submitted to plaintiffs' counsel and the Court at the time such announcement is released.

NPIJ

(b) Promptly after examinations are held, the following shall be given to plaintiffs' counsel and submitted to the Court.

(1) Copies of examinations.

(2) A report on the racial and ethnic composition, i.e., black, Puerto Rican or non-minority, of the examination assistants who administer the examination.

(3) A report on the racial and ethnic composition of applicants taking, passing, and failing the examinations.

(4) A copy of the notice given to applicants regarding their right of appeal.

4. Development and Administration of Step 2 examinations.

Promptly after the completion of any prototype Step 2 examinations, the Board of Examiners shall give to plaintiffs' counsel and submit to the Court a report on the ethnic and racial composition of examination assistants who conducted Step 2 examinations.

5. Validation Reports

(a) Promptly after the holding of each Step 1 prototype examination, the Board of Examiners shall give plaintiffs' counsel and submit to the Court a report on the content

validity of such examination.

(b) A copy of the Consultant's validation studies shall be given to the plaintiffs' counsel and submitted to the Court promptly after it is received by the Board of Examiners.

B. For the purpose of determining or securing compliance with this Final Judgment, ~~and for no other purpose,~~ and subject to any legally ~~recognizable~~ recognized privilege, and the entry of an appropriate protective order, defendants will provide plaintiffs' counsel with such other information with respect to the three prototype examinations described in the Plan as is necessary for them to make a determination regarding compliance with this Judgment, provided that:

1. plaintiffs' counsel give defendants reasonable written notice of the information required; and
2. the information requested is relevant to a determination concerning compliance with this Judgment; and
3. ~~the request for information does not impose an undue burden on the defendants; and~~
4. the information requested will not jeopardize the security of examinations or the confidentiality of the identity of examination assistants. ~~Provided, however, that in no event shall the Board of Examiners be required to disclose to the plaintiffs' counsel the contents of actual examinations in advance of the holding of~~

538a

C. Defendants shall supply or make available for inspection any other material necessary to comply with paragraph X of the Final Judgment of July 12, 1973, or to comply with the Order of March 25, 1975, to which this Plan is "Exhibit A". Plaintiffs' approval of each step is not necessary, but information is to be made available to plaintiffs (1) so that they may offer comments and suggestions which may facilitate rapid implementation of a constitutional selection system and (2) so that all information necessary to insure that the new system is constitutional, as implemented, will be collected and available without undue delay.

Memorandum Decision of Judge Tyler, dated
April 1, 1975

SOUTHERN DISTRICT OF NEW YORK ----------X

BOSTON M. CHANCE, LOUIS C. MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

----------X

MEMORANDUM

70 Civ. 4141 HRT

#42144

TYLER, D.J.

This memorandum relating to the "Order Modifying Final Judgment and Order" of March 25, 1975, is being filed simply to explain the rationale of that order and, perhaps as well, to assist the transferee judge and counsel in its implementation.

The March 25th order was the result of several motions by all parties to this action. My intent in fashioning the order was to balance the Board of Examiners' need to be allowed to fashion a new selection system, in

accordance with its statutory duties, with the desire of the plaintiff classes to be reasonably certain that the new system will be implemented in a constitutional manner. To achieve this balance, the Board of Examiners and the Board of Education are authorized and permitted to develop and implement the new system, according to the Plan agreed upon by the parties and subject only to their disclosure to plaintiffs' counsel of all relevant material.

The March 25th order was fashioned with the hope and expectation that defendants may be benefitted in the discharge of their public duties by having another party or parties, with a different viewpoint, comment on perceived deficiencies in the new system. Hence, plaintiffs' counsel are entitled to review all relevant material as soon after it is available to defendants as is practicable. To the extent there is any conflict in the March 25th order regarding the time at which material must be made available to plaintiffs' counsel (absent a protective order), that conflict should be resolved in favor of the earliest disclosure.

Unfortunately, based on the history of this litigation and the apparent absence of trust between the parties and counsel, it is not unlikely that conflicts will arise. To avoid delay in the implementation of a new,

constitutional licensing system, I have tried to limit the litigable issues 542a
while insuring that the new system will be constitutional. Essentially, defendants must provide all relevant information, absent an order to avoid dissemination of test questions or of the identity of examiners before a test is given. If any protective orders must be entered, they should seek only to protect the integrity of the new, competitive system; they should not permit defendants to avoid disclosure of material for any other reason which I can foresee. Moreover, defendants should not need to invoke this court's jurisdiction except, possibly, after a test has actually been developed and examinations are to be administered.

It should be noted that, while they are to be granted access to material developed for defendants, or in the possession of defendants, which relates to the new system, plaintiffs are not given any formal power to affect the manner in which the tests are developed and administered, as long as the March 25th order and the Plan annexed thereto are followed. But, as a practical matter, it is to be hoped that defendants and their counsel will informally consider any suggestions plaintiffs care to make. Such receptivity may enhance the possibility that a new system will be implemented without

further litigation; it may also result in a better and fairer licensing system.

But the defendants need not agree with plaintiffs' suggestions, and plaintiffs will be impotent to force their views through court orders. The only court review will be of the new system itself (rather than of its development), as each new test is implemented, to determine whether it is constitutional, not to determine whether it is the best test or the fairest test which could conceivably be created.

The reporting requirements set forth in the March 25th order and Plan attached thereto will insure that no lengthy and costly discovery will be necessary to aid in the determination of whether the test meets constitutional standards. Requiring such continual disclosure is justified in this instance because previous, adamantly contested litigation in this case established a prima facie case that the old examination and licensing system violated federal constitutional guarantees. The community is entitled to the competitive examination licensing procedure, which its legislature has determined appropriate, as soon as possible. The community is also entitled to a system which satisfies constitutional standards. The March 25th order and Plan was entered to effectuate these goals as well as possible.

Dated: April 1, 1975

U.S.D.J.

Plaintiffs'Notice of Motion, with proposed amended complaint, dated September 23, 1975

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al., Plaintiffs, -against- THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., Defendants, COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1 SASOF, AFL-CIO, Defendant-Intervenor.	70 Civ. 4141 (M.P.) NOTICE OF MOTION FOR LEAVE TO AMEND COMPLAINT

TO: W. Bernard Richland, Esq.
Corporation Counsel
Municipal Building
New York, New York 10007
Attn: Leonard Bernikow, Esq.

Saul Z. Cohen, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, New York 10022

Leonard Greenwald, Esq.
Frankle & Greenwald
80 Eighth Avenue
New York, New York 10011

SIRS:

PLEASE TAKE NOTICE that upon the papers filed herewith, plaintiffs will move this Court pursuant to F. R. Civ. P. 15 for leave to amend the complaint herein as indicated in the attached Amendment, on the third day of October, 1975, at the United States Courthouse, Foley Square, New York, New York at 10:00 A.M. or as soon thereafter as counsel may be heard.

Dated: New York, New York
September 23, 1975

Respectfully submitted,

ELIZABETH B. DuBOIS
(Legal Action Center of the
City of New York, Inc.)
271 Madison Avenue
New York, New York 10016
(212) 679-6502

GEORGE COOPER
435 West 116 Street
New York, New York 10027

JACK GREENBERG
10 Columbus Circle
New York, New York 10019

JEANNE R. SILVER
20 West 40 Street
New York, New York 10018

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS C. MERCADO, et al., Plaintiffs, -against- THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., Defendants, COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1 SASOF, AFL-CIO, Defendant-Intervenor.	:	70 Civ. 4141 (M.P.) AMENDMENT TO COMPLAINT

The Amended Complaint herein is hereby amended to add the following supplementary allegations:

1a. Jurisdiction of this complaint is further conferred by 42 U.S.C. §2000e-5(f)(3).

14a. Defendant Board of Examiners and Defendant Board of Education and the other defendants named herein are government, governmental agencies and/or the agents, employees or controlling officials thereof, and are thereby employers within the meaning of 42 U.S.C. §§2000e(a), 2000e-2(a).

14b. Defendant-Intervenor, the Council of Supervisors and Administrators is a labor union or organization within the meaning of 42 U.S.C. §§2000e(a), 2000e-2(b).

25a. The actions of defendants described in paragraphs 15-24 hereof discriminate against plaintiffs and their classes with respect to compensation, terms, conditions and privileges of employment and operate as a failure or refusal to hire plaintiffs and their classes, all because of the race, color or national origin of plaintiffs and their classes. As such, the

actions of defendants violate plaintiffs' rights protected by 42 U.S.C. §2000e-2(a)-(c).

Dated: New York, New York
September 23, 1975

ELIZABETH B. DuBOIS
(Legal Action Center of the
City of New York, Inc.)
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20 West 40 Street
New York, New York 10018

Attorneys for Plaintiffs

Board of Education's Notice of Cross-Motion, dated October 2, 1975, together with supporting affidavit of Elliot P. Hoffman, sworn to October 2, 1975

IN THE UNITED STATES DISTRICT COUPT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BOSTON [illegible] CHA[illegible]E, LOUIS C. MERC[illegible]OO, et al., Plaintiffs, -against- THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., Defendants.	70 Civ. 4141 (M.P.) NOTICE OF CROSS-MOTION TO DISMISS AMENDED COMPLAINT

TO: Elizabeth B. DuBois
(Legal Action Center of the
City of New York, Inc.)
271 Madison Avenue
New York, New York 10016

Saul Z. Cohen, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
425 Park Avenue
New York, New York 10022

Leonard Greenwald, Esq.
Frankle & Greenwald
80 Eighth Avenue
New York, New York 10011

MADAM and SIRS:

PLEASE TAKE NOTICE that upon the papers filed herewith, defendant Board of Education will move this Court pursuant to F.R. Civ. P. 12b(1) and (6) for an order dismissing the Title VII allegation of the complaint if amended to include same, on the third day of October, 1975, at the United States Courthouse, Foley Square, New York, New York at 10:00 A.M. or as soon thereafter as counsel may be heard.

Dated: New York, New York
October 2, 1975

Respectfully submitted.

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Defendant
Municipal Building
New York, N.Y. 10007

ELLIOT P. HOFFMAN
Assistant Corporation Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, LOUIS MERCADO, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants.

AFFIDAVIT

70 Civ. 4141

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ELLIOT P. HOFFMAN, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of W. BERNARD RICHLAND, Corporation Counsel. the attorney for the defendant Board of Education. I submit this affidavit in opposition to the plaintiffs' motion to amend the complaint to add a cause of action under 42 U.S.C. 2000e, et seq. (Title VII) and in support of defendant's motion to dismiss the complaint, if amended.

2. The motion is supported by neither memorandum nor affidavit. However, it is clear that the memorandum submitted by plaintiffs regarding the motion of the defendants for reconsideration of the counsel fee issue relates to the motion as well.

3. Defendant opposes this motion to amend the complaint on the grounds that:

(a) The issues have already been litigated and are covered by a final consent decree;

(b) To the extent, if any, that the issues are not covered by that decree, they are moot in that the practices described in the previously amended complaint are no longer in existence;

(c) By the terms of the above-mentioned consent decree, plaintiffs waived all other claims which they might have and at the time the decree was entered a Title VII claim could have been asserted after the fulfilling of the jurisdictional prerequisites.

3. In the event that this complaint is amended, it should be dismissed because:

(a) Plaintiffs have failed to exhaust the requisite administrative remedies;

(b) It is barred by the statute of limitations;

(c) The complaint is moot in that the conditions complained of are no longer in existence and those conditions have been changed in a manner agreed to by plaintiffs.

4. As plaintiffs have apparently done we rely on our memoranda submitted on attorney's fees motion.

ELLIOT P. HOFFMAN

Sworn to before me this

2nd day of October, 1975

SHARON L. FEISENBAUM
Commissioner of Deeds
City of New York No. 2-2767
Certificate filed in New York County
Commission Expires March 1, 1977

Opinion of Judge Pollack dated February 11, 1976

LEGAL FILE

554a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

BOSTON M. CHANCE, LOUIS C. MERCADO, et al., :

Plaintiffs, :

v. :

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., : 70 Civ. 4141(MP)

Defendants, :

COUNCIL OF SUPERVISORS AND ADMINISTRATORS OF THE CITY OF NEW YORK, LOCAL 1 SASOC, AFL-CIO, :

Defendant-Intervenor. :

----------x

COPY

#41874

OPINION

APPEARANCES:

Attorneys for Plaintiffs:

Elizabeth B. DuBois, Esq.
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APPEARANCES: 555a

W. BERNARD RICHLAND
Corporation Counsel of the City of New York
(Attorney for Defendant Board of Education)
Municipal Building
New York, N.Y. 10007
By: Leonard Bernikow, Esq. and
Elliot P. Hoffman, Esq. of Counsel

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
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By: Howard A. Jacobson, Esq. and
Robert S. Ellenport, Esq.

FRANKLE & GREENWALD
(Attorneys for Intervenor-Defendant Council of
Supervisors & Administrators of the City of
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80 Eighth Avenue
New York, N.Y. 10011
By: Max H. Frankle, Esq.,
Leonard Greenwald, Esq., and
Gretchen White Oberman, Esq. of Counsel

MILTON POLLACK, District Judge.

MILTON POLLACK, District Judge. 556a

This is the latest installment in an extensive pending litigation which has consumed the energies of the federal courts for nearly six years. The defendant Board of Education (hereafter, the "Board") seeks a reconsideration of an order herein dated April 4, 1975 by former Judge Harold R. Tyler of this Court (now Deputy Attorney General of the United States) which ruled that plaintiffs were entitled to an award of attorneys' fees to be fixed herein for successful services rendered in this suit. The defendant Board relies on the Supreme Court's recent decision in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) for an order setting aside Judge Tyler's order and denying a fee award to the plaintiffs. In response, plaintiffs have cross-moved for leave to amend their complaint to add an additional ground for the allowance of fees, not previously available nor asserted heretofore. The Board has countered by objecting to the proposed amendment and has filed a motion challenging the sufficiency of the additional claim proposed.

Reconsideration of Judge Tyler's order is granted and upon such reconsideration this Court finds that the ruling should be adhered to for the reasons which appear hereafter. Plaintiffs' motion to amend the original complaint will be denied, however; and accordingly, the Board's motion challenging the sufficiency of the proposed amendment will be dismissed as moot.

A. Background

This civil rights class action, brought under 42 U.S.C. §§ 1981, 1983, challenged the examinations used to select principals and other supervisors in the New York City school system on the ground that the examinations discriminated against minority groups in violation of the Fourteenth Amendment. Extensive negotiations and court proceedings produced a consent judgment entered against the defendant Board of Examiners (hereafter, "Examiners") on July 12, 1973 and against the Board on March 25, 1975. The judgment prohibited the use of the challenged examinations, established an interim system for the selection of supervisors, and ordered the development of a permanent selection system based on non-discriminatory job-related examinations. A more detailed discussion of the suit may be found in Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1974). Subsequent proceedings in the case have focused on the effects of the judgment on an existing collective bargaining agreement between the Board and the Council of Supervisors and Administrators, intervenor-defendant, (hereafter, the "CSA") and on the Board's plan to "excess" supervisory personnel

from eliminated positions on a "last-hired, first-fired" basis. As to the latter issue, the Court of Appeals has recently reversed an order of the District Court (Tyler, J.) which imposed racial quotas on the excessing process. Chance v. Board of Examiners, Civ. No. 75-7161, 7164, (2d Cir., January 19, 1976).

In his decision of April 4, 1975, Judge Tyler evaluated several distinct grounds for an award of counsel fees asserted by the plaintiffs and rested his decision on an "analogy to Title VII [of the Civil Rights Act of 1964] and on the private attorney general theory." Chance v. Board of Examiners, Civ. No. 70-4141(HRT) (S.D.N.Y., April 4, 1975). The Board contends here that the decision of the Supreme Court in Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975), prohibits the award of attorneys' fees to plaintiffs in such cases, in the absence of specific statutory authorization for such relief and contends further that there is no such statutory authority here. Judge Tyler's reliance on the private attorney general theory rested in part on an award on that ground made by a District Court. However, that decision has subsequently been reversed by the Second Circuit on the authority of

Alyeska. Kirkland v. New York State Department of Correctional Services, 520 F.2d 420, 430 (2d Cir. 1975).

The question this Court must decide on this motion for reconsideration, therefore, is whether there is a "specific and explicit" statutory provison for the allowance of counsel fees to the plaintiffs in this case. Alyeska, supra, at 260. The plaintiffs contend that there are two such statutes. By moving to amend their complaint to allege a claim under Title VII, 42 U.S.C. § 2000e, they seek to render applicable that statute's authorization of an award of attorneys' fees to the prevailing party in a suit brought under that Title. 42 U.S.C. § 20003-5(k). They also contend that, independently of an amended Title VII complaint, they are entitled to counsel fees by virtue of § 718 of the Emergency School Aid Act, 20 U.S.C. § 1617. The defendants contend that the latter statute is inapplicable to the present law suit, and that the motion to amend the complaint to assert a Title VII claim may not be properly granted at this stage of the litigation.

B. Title VII

Plaintiffs could not have alleged a Title VII claim when they first brought their action in 1970, since at that time the statute exempted state and local government agencies from its coverage. This exemption was deleted, however, effective March 24, 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2, 86 Stat. 103.

While plaintiffs contend that a denial of their motion to amend the complaint at this time would exalt form over substance, it appears to be they who are seeking to do just that. The attorneys' fees provision of Title VII authorizes the award of such fees to the prevailing party "[i]n any action or proceeding under this subchapter." The plaintiffs concede that they now wish to amend their complaint to state a Title VII claim for "the sole and only purpose" of clarifying their right to counsel fees; they do not seek any substantive relief under Title VII. Indeed, they could not do so, for the plaintiffs are enjoined in the consent judgment of July 12, 1973 from asserting any new claims "which might have been asserted against the defendants" in connection with the

instant litigation.

Title VII and §§ 1981 and 1983 are "independen[t] avenues of relief" which are "separate, [and] distinct." Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460-61 (1975). By limiting the purpose of their proposed Title VII claim to the recovery of attorneys' fees, plaintiffs are clearly seeking such fees under Title VII for litigation in which substantive relief was granted under §§ 1981 and 1983. Yet that is precisely what Alyeska and Kirkland, supra, determined to be improper. Accordingly, the plaintiffs' motion to amend the complaint should be denied. Any analysis to the contrary in the original opinion awarding fees in this case may not withstand the teaching of those subsequent cases.

Moreover, plaintiffs have failed to comply with the variety of procedural requirements, involving a preliminary resort to the Equal Employment Opportunity Commission, which are "jurisdictional" prerequisites of maintenance of a civil action under Title VII in the federal courts. See DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2d Cir.) modified on other grounds, 520 F.2d 409 (2d Cir. 1975).

It is true that a failure to observe such requirements may be excused in some circumstances, since the law does not require that plaintiffs engage in a "futile ceremony" or participate in a "charade." De Figueiredo v. TWA, 322 F. Supp. 1384, 1387-88 (S.D.N.Y. 1971); Weise v. Syracuse University, Civ. No. 74-1977 (2d Cir., July 14, 1975). If plaintiffs sought some substantive relief under Title VII, therefore, it is possible that their failure to invoke the conciliation process of the EEOC would be overlooked in view of the fact that plaintiffs' litigation had long since been underway when Title VII first became available to them. That is not the case however; instead, plaintiffs are seeking the benefits of some of Title VII's procedures -- the authorization of counsel fees -- without having borne the burdens of the others. If there is any "charade" here, it is one proposed by plaintiffs. In these circumstances, there appears to be no compelling reason for the Court to excuse plaintiffs' failure to comply with the statutory scheme.

C. 20 U.S.C. § 1617

Section 718 of the Emergency School Aid Act, 20 U.S.C. § 1617, provides that:

> Upon the entry of a final order by a court of the United States against a local educational agency, a State (or any agency thereof) ... for failure to comply with ... the fourteenth amendment to the Constitution of the United States as [it] pertain[s] to elementary and secondary education, the court, in its discretion, upon a finding that the proceedings were necessary to bring about compliance, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Since plaintiffs' suit sought to redress a violation of the Fourteenth Amendment and was brought "for the purpose of correcting an underrepresentation of minorities in supervisory positions in the New York City school system," Chance, supra, Civ. No. 75-7161 (2d Cir., Jan. 19, 1976), § 1617 appears applicable.

Nonetheless, the defendant Board of Education contends that this litigation does not "pertain to ... education" in the sense Congress intended in enacting § 1617. The Board argues that Congress was primarily interested in actions to promote desegregation of schools, not suits against discrimination in employment by defendants who happen to operate educational facilities. Authorization for counsel fees in such employment suits, the Board alleges, is within the exclusive province of Title VII.

It is true that many of the decisions granting counsel fees under § 1617 involve desegregation. See, e.g., United States v. Board of School Commissioners, 503 F.2d 68 (7th Cir. 1974), cert. denied, 421 U.S. 929 (1975); Brewer v. School Board, 500 F.2d 1129 (4th Cir. 1974); Medley v. School Board, 482 F.2d 1061 (4th Cir. 1973), cert. denied, 414 U.S. 1172 (1974). However, the Board concedes, as it must, that counsel fees have also been awarded under § 1617 to teachers and school supervisory personnel who have been discriminated against in regard to hiring, firing, and promotion. Nonetheless, the Board argues that such awards have been made only where the challenged employment practice was incident to the implementation of a desegregation plan, and were thus consistent with the Board's restrictive view of § 1617. See, e.g., Ward v. Kelly, 515 F.2d 908, (5th Cir. 1975); Thompson v. Madison County Board of Education, 496 F.2d 682 (5th Cir. 1974); Jackson v. Wheatley School District No. 28, 489 F.2d 608 (8th Cir. 1973) (Judge Moore of the 2d Circuit sitting by designation).

Even if that were the case, however, there seems little reason to distinguish among employment discrimination suits by teachers and principals on the basis that some follow on the heels of desegregation of a school district, and others do not. In Armstead v. Starkville Municipal Separate School District, 395 F. Supp. 304 (N.D. Miss. 1975), for example, attorneys' fees were awarded under § 1617 in an employment discrimination case brought by teachers on facts which were very similar to those in Chance. The plaintiffs challenged the school board's policy of retaining only those teachers who achieved a certain minimum score on the Graduate Record Examination. The District Court found that the examination was not job related and had a racially discriminatory effect. Although the teachers' suit did follow a desegregation order, there is nothing in the text of § 1617 which would justify an award in Armstead but a denial in Chance.

It is conceivable that an employment discrimination suit brought by a single individual school employee might have insufficient impact on the educational process to

warrant the application of § 1617. However, a suit properly brought as a class action by teachers or principals inevitably has a substantial effect on the representation of minorities in important roles in the schools, and therefore would appear to fall within the ambit of the statute. See Morton v. Charles County Board of Education, 373 F. Supp. 394 (D. Md. 1974) (fees awarded under § 1617 in employment discrimination suit by single principal where litigation helped eliminate racially identifiable faculty); Aspira of New York, Inc. v. Board of Education, 65 F.R. D.541 (S.D.N.Y. 1975)(fees awarded for suit challenging lack of bi-lingual school instruction; limitation of § 1617 to desegregation suits expressly rejected).

Since neither the text of the statute nor the precedents which have applied it suggest that the instant case should be excluded from its coverage, the narrow construction of § 1617 favored by the defendant Board should be sustained only if it is compelled by the legislative history, as the Board contends. The provision had its genesis as § 11 of S. 1557, 92d Cong., 1st Sess. (1971), a bill which was in large part enacted into law

as part of the Education Amendments of 1972. 1/ While there was considerable discussion and analysis of § 11 by the Congress to which this Court may look for guidance in the interpretation of § 1617, it is far from conclusive, and in any event, does not sustain the position adopted by the defendant Board.

The attorneys' fees provision was included as a part of a legislative proposal to provide financial assistance to school districts which were involved in the desegregation process. Hence, much of the floor debate on the amendments which were made in the Senate to delete the provision and then restore it in modified

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1/ Section 1617 was enacted as § 718 of the Emergency School Aid Act, which in turn was approved by Congress as part of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235. There was apparently no discussion of the attorneys' fees provision on the floor of either House of Congress when the measure was passed in the spring of 1972, and the committee reports are similarly devoid of analysis, H. Rep. 92-554, 92d Cong., 1st Sess. (1971), S. Rep. 92-604, 92d Cong., 2d Sess. (1972). The report of the conference committee does describe the provision, but sheds no light on the issue before the Court. S. Conf. Rep. 92-798, 92d Cong., 2d Sess. (1972).

form concerned its application in school desegregation suits.[2/] Nevertheless, there is no indication that the senators intended the provision to be limited to such suits. Indeed, one senator based his opposition to the provision in part on the ground that it "contains no language to control the kinds of suits brought by private attorneys" and "fails to control or delineate the scope of coverage." S. Rep. 92-61, 92d Cong., 1st Sess. (1971) at 61-63 (individual views of Mr. Dominick). Another senator who supported the measure explained that

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2/ As reported from the Senate Committee, § 11 of S. 1557 provided for attorneys' fees to be awarded to plaintiffs in language almost identical to that enacted in § 1617; however, it also provided that such fees would be paid by the federal government, not the defendant school boards, and it authorized a fund of $15-million to accomplish that purpose. The Senate passed an amendment to delete § 11 entirely on April 21, 1971, 117 Cong. Rec. 11345 (1971), but restored it two days later without the provision for federal funding of counsel fees, 117 Cong. Rec. 11726 (1971).

An analagous attorneys' fees provision was also included in H.R. 2266, the House counterpart to S. 1557, which was reported from the House committee on October 19, 1971. While eventually enacted as part of the Education Amendments of 1972, that bill was initially defeated by the House on November 1, 1971 after a debate in which the attorneys' fee provision played a minor role. 117 Cong. Rec. 38493 (1971).

> This amendment says one very simple thing. It says that if it is necessary to bring an action by reason of the violation of ... the fourteenth amendment to the Constitution of the United States.... the school board should be compelled to pay those attorney's fees and costs.... 117 Cong. Rec. 11527-28 (1971) (remarks of Sen. Cook).

Finally, the report on S. 1557 of the Senate Committee on Labor and Public Welfare, the most reliable source of congressional intent on the measure, indicated that the provision was designed to insure "vigorous nation-wide enforcement of Constitutional and statutory protection against all forms of discrimination based upon race, color and national origin in elementary and secondary education." S. Rep. 92-61, 92d Cong., 1st Sess. (1971) at 25 (emphasis added). Thus, while the primary purpose for the enactment of § 1617 may have been to allow the award of attorneys' fees in school desegregation cases, it is clear that Congress did not intend to limit the

application of the provision to such suits.[3/]

Under this interpretation of the statute, the plaintiffs are entitled to a reasonable attorneys' fee. The defendants Board and Examiners are local educational agencies and state agencies, and the consent judgment constitutes a final order against them which arose from their failure to comply with the Fourteenth Amendment as it pertains to elementary and secondary education.

3/ The defendant Board of Education notes that § 1617 was enacted in 1972 some three months after Title VII of the Civil Rights Act was amended to extend its coverage to employees of government agencies and educational institutions. It contends that the award of attorneys' fees in employment discrimination suits against schools was therefore already authorized prior to the passage of § 1617, and that Congress should not be deemed to have legislated redundantly. Accordingly, the Board argues that the timing of the two statutes supports its restrictive reading of § 1617.

The Board overlooks that at the time each measure was reported from committee -- and the committee report is the most reliable indicium of congressional intent -- neither had been enacted into law, and that, in fact, the predecessor of § 1617 had already passed the Senate before the relevant Title VII amendments were first reported from committee in the 92d Congress. 117 Cong. Rec. 11726 (April 23, 1971) (Senate approves attorneys' fees amendment to S. 1557); H. Rep. 92-238, 92d Cong., 1st Sess. (June 2, 1971) (first committee report in 92d Cong. on Title VII amendments).

Court proceedings were necessary to bring about that compliance. While § 1617 provides that an award remains in the discretion of the Court even where all these criteria are met, the Supreme Court has established that the allowance is essentially automatic "'unless special circumstances would render such an award unjust.'" Northcross v. Board of Education, 412 U.S. 427, 428 (1973). No adverse special circumstances have been brought to the Court's attention in this case. There is no question that § 1617 authorizes the award of fees for work which antedated its enactment, where the fee application had not been finally determined prior to that date. Bradley v. School Board, 415 U.S. 696 (1974).

Defendants are liable to the plaintiffs for counsel fees only in connection with the matters on which they prevailed in the litigation. Plaintiffs produced the consent judgment against the defendants Board and Examiners, and procured the clarification of that judgment in regard to the filling of supervisory vacancies by the transfer of other personnel. Chance v. Board of Examiners, Civ. No. 70-4141(WRM), 7 Emp. Prac. Dec.

¶ 9084 (S.D.N.Y., Dec. 27, 1973). Plaintiffs have not prevailed in regard to the excessing issue.

Finally, it is necessary to clarify the liability of the intervenor-defendant CSA for plaintiffs' counsel fees. CSA has acted in the role of amicus curiae throughout most of this litigation, in part because plaintiffs "strenuously resisted," as the plaintiffs phrase it, CSA's several motions to intervene. Plaintiffs may not now turn around and assert liability against CSA as if it had been an intervenor from the onset of the litigation. Plaintiffs have cited no authority for an award of attorneys' fees against an amicus curiae, and this Court will provide none.

Moreover, CSA may not be held liable for attorneys' fees to plaintiffs for the brief period during which CSA was granted intervenor status and plaintiffs were the prevailing parties, for § 1617 does not authorize such liability. While the statute may not speak precisely to the issue, it is apparent that it authorizes the award of fees against local educational and state agencies, not against private parties. See McCrary v. Runyon, 515 F.2d

1082, 1090 (4th Cir.), cert. granted, 44 U.S.L.W. 3271 (Nov. 11, 1975). Although fees were awarded against a city council under § 1617 in Northcross v. Board of Education, 489 F.2d 19 (6th Cir. 1973), cert. denied, 416 U.S. 962 (1974), the Sixth Circuit Court of Appeals had authority for that award independent of § 1617, and the city council there had acted to prevent the local educational authority from complying with the lawful orders of the Court.

The motion of defendant Board of Education to strike the award heretofore made of attorneys' fees to plaintiffs is thus denied. The plaintiffs' motion to amend the complaint is denied, and the cross-motion of defendant Board of Education to dismiss the amended complaint is moot. A reasonable fee for plaintiffs' attorneys will be determined and awarded herein upon an evidentiary hearing of the relevant facts. Plaintiffs' application therefor, fully documented, should be completed and served on defendants who may have documentary discovery and take any desired appropriate depositions upon informal notice and request therefor, the same to be completed within 60 days hereof. The date

for the hearing will be fixed upon advice to the Court that the parties are ready to proceed therewith.

So ordered.

Milton Pollack
U.S. District Judge

February 11, 1976

Letter dated April 5, 1976, from Howard
A. Jacobson to Judge Pollack

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April 5, 1976 576a

BY HAND

Honorable Milton Pollack
United States District Judge
U.S. Court House
Foley Square
New York, New York

Re: Chance v. Board of Examiners

Dear Judge Pollack:

We have received a copy of a letter to this Court dated April 2, 1976 from counsel to the Board of Education requesting a further extension of time within which to file a motion to modify the Consent Judgment herein. On behalf of our client, the Board of Examiners, we vigorously oppose further delay in this case and, pursuant to your rules, seek permission of this Court to move formally for the entry of an order requiring the immediate implementation of the Consent Judgment.

A review of the facts is revealing. On May 24, 1974 all parties herein jointly submitted to this Court a Plan for new comprehensive examinations for supervisory personnel in the New York City school system. That Plan had been jointly developed and agreed to by all parties -- with the exception of two issues, which are not here in dispute and which the parties agreed to submit to this Court for resolution.

At a hearing on January 14, 1975, Judge Tyler approved the Plan. The two open issues were thereafter finally resolved and on March 25, 1975 an order was entered formally incorporating the Plan within the Consent Judgment.

Thus, the Plan was jointly developed by all the parties herein, its contents (with two exceptions not at issue here) have been known to all parties since May 1974, this Court approved the Plan in January 1975 and the Plan has been formally part of the Consent Judgment since March 1975.

The Plan calls for the initial development of three prototype examinations for three prototypical supervisory positions. The first step in the creation of those three prototype examinations is the development of job analyses for those positions by the Board of Education utilizing A.I.R., an independent consulting firm.

Well prior to the entry of the March 25, 1975 order, the Board of Education had already chosen a consulting firm to create those job analyses and, to our knowledge, a contract between the Board of Education and that firm had already been signed. Yet, to date, the Board of Education has not come forward with job analyses acceptable to it. Since the Plan provides that the three prototype examinations should be developed from the job analyses the Board of Education's default has the effect of delaying the Board of Examiners' ability to develop the examinations themselves utilizing its consulting firm.*

It was because of the Board of Education's prolonged delay that the Board of Examiners sought a pre-motion conference with this Court, in accordance with its rules. At that conference, which was held on January 22, 1976, counsel for the Board of Education pleaded for additional time to carry out its responsibilities under the Plan with respect to the job analyses. At no time during that conference was there any suggestion that the Board of Education wished to modify that Judgment in any way. In fact, Michael Rosen, Esq., counsel to the Chancellor of the City School District, expressly stated that the Board of Education intended to carry out its responsibilities under the Plan. Accordingly, although this Court indicated that the Board of Education's conduct appeared to be contumacious, it agreed to a six-week adjournment of the pre-motion conference until March 4, 1976 so that the Board of Education could fulfill its responsibilities with respect to the job analyses.

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* At the end of June 1975 the Board of Education entered into a contract with Development Dimensions Inc., whereby that firm is to develop the prototype examinations for the Board of Examiners. Partial payment has already been made to Development Dimensions Inc. under that contract.

At the adjourned conference, on March 4, counsel for the Board of Education explained that it had rejected the job analyses which had been created by its consultants, and announced, for the first time, that it wished to move to modify the Plan which is part of the Consent Judgment. The Board of Education's counsel also stated that it and plaintiffs' counsel were in the midst of meetings with respect to such a modification and, for that reason, expressed reluctance to discuss details of it. Over our objections, this Court deferred action on the Board of Examiners' motion to implement the Consent Judgment and adopted a schedule for the Board of Education's motion to modify the Judgment whereby the Board of Education would serve its motion by March 18, opposing papers would be served by April 1, and a hearing date would then be scheduled for sometime during this month of April. This Court also indicated that if it denied the Board of Education's motion to modify the Consent Judgment, it would feel free to enter such orders as might be necessary to require immediate implementation of that Judgment.

Thereafter, the Board of Examiners consented to a one-week extension of the Board of Education's time to make its motion until March 25 because the Board of Education wished to meet with the Board of Examiners to see whether an agreement could be reached between them. The Examiners met with the Board of Education and found the Board of Education's proposal to be totally unacceptable. However, the Examiners did make suggestions aimed at satisfying what they thought were the Board of Education's concerns. The Examiners agreed to a second one-week extension of the Board of Education's time, to April 1, because the Board of Education's counsel claimed that they needed that time to complete their motion papers.

Incredibly, after the April 1 date has come and gone, the Board of Education's counsel now seek another extension of their time to make their motion, this time "at least until April 9th, 1976" and, as their current excuse for the repeated delay, the Board of Education now refers to negotiations with plaintiffs about their motion.

Thus, since we brought the Board of Education's default under the Consent Judgment to this Court's attention in January 1976, the Board of Education has obtained

Honorable Milton Pollack April 5, 1976

a series of delays in carrying out its responsibilities under that Judgment: first, to March 4, in order to act on the job analyses; second, to March 18, to move to modify the Judgment; third, to March 25, to meet with the Board of Examiners; and fourth, to April 1, to complete its motion papers. Now, the Board of Education seeks further time allegedly because of meetings with plaintiffs' counsel.

The Board of Examiners is concerned about this pattern of delay in implementing the plenary supervisory examinations contemplated by the Consent Judgment and long awaited by the New York City educational community, as well as by both this Court and the Court of Appeals for the Second Circuit. It believes it to be imperative that prompt action be taken so that development of examinations can begin before the end of the current school year -- only about 10 weeks away.

In view of the extraordinary delay to date, we hereby seek permission of this Court on behalf of the Board of Examiners to file a formal motion to implement the Consent Judgment. Since the Board of Education has demonstrated that it is unwilling to adopt satisfactory job analyses in accordance with the Plan which is part of the Judgment, the Examiners should be authorized by this Court to prepare such analyses themselves pursuant to the Plan utilizing its independent consulting firm.

Respectfully yours,

Howard A. Jacobson

HAJ:ak

cc: Deborah Rothman, Esq.
Jeanne R. Silver Frankl, Esq.
Elizabeth B. DuBois, Esq.

Board of Education's Notice of Motion (with exhibit) dated April 9, 1976, together with supporting affidavit of Robert Christen (plus exhibits), sworn to April 12, 1976.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOSTON M. CHANCE, et al.,

Plaintiff,

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants.

NOTICE OF MOTION

Index No.
70 Civ. 4141
(M.J.P.)

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of Robert Christen, sworn to April 12, 1976, and upon the pleadings and all other papers and proceedings had herein, and pursuant to paragraph V of this Court's Order Modifying Final Judgment and Order, entered against all defendants, March 25, 1975 (hereinafter the "March 25, 1975 Order") and paragraph XIV of the Final Judgment herein against defendant Board of Examiners, its members, and defendant Chancellor of the City School District of the City of New York, entered on July 12, 1973, and paragraph XIV of an Order containing similar terms which modified the preliminary injunction previously issued against the Board of Education, its members and the Chancellor of the City School District, entered on July 12, 1973, both of which were incorporated in the aforesaid March 25, 1975 Order, defendants Board of Education and Chancellor will move this Court, at the United States Courthouse, Foley Square, New York, New York on a date to be determined by the Court for an Order:

1. Approving the modified Plan for licensing and selecting supervisors in the New York City school system annexed hereto as Exhibit "1" and permitting the defendants to develop a new supervisory selection and licensing system in accordance with this modified Plan.

2. Modifying said March 25, 1975 Order by:

   a. striking paragraph VI thereof together with the Plan referred to therein;

b. amending the reporting provisions contained in the introductory paragraph and subparagraphs A-D of paragraph VII of the March 25, 1975 Order by deleting them in their entirety and substituting therefor the provisions included in section VI of the Plan annexed as Exhibit "1" hereto.

3. Providing that, except to the extent inconsistent herewith, the provisions of the March 25, 1975 Order shall continue in full force and effect against all the defendants.

4. Granting such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
April 9, 1976

W. BERNARD RICHLAND
CORPORATION COUNCIL
Attorney for Defendants
The Board of Education and
Chancellor

By Deborah Rothman
Deborah Rothman
Assistant
Corporation Council

Municipal Building
New York, New York 10001
(212) 566-2186/2192

Introduction & Summary

This Plan provides for the development of "open qualifying" examinations by the Board of Examiners in fulfillment of its statutory responsibility to provide examinations for the licensing of supervisors on the basis of "merit and fitness." The Plan also describes adaptations of appointment procedures that have been developed by the Board of Education which will be coordinated with the new licensing process to effect a non-discriminatory, job-related process of qualifying and selecting supervisory personnel.

The fundamental goal of this Plan is to develop a valid, job-related selection system, consistent with the requirements of Title VII of the 1964 Civil Rights Act, as amended, and of the United States Constitution.

The premise of this Plan is that the new supervisory selection system must be characterized by two main features:

1) The use of qualifying procedures which facilitate entry by diversely talented and experienced individuals into competition for supervisory appointments; and

2) The use of on-the-job evaluation as a basis for determining permanent licensure.

Additional considerations are that qualifying procedures must be practical and economical, on-the-job evaluations must be developed and implemented respectively by the authorities best capable of fulfilling each function, and all procedures must be designed and administered to obviate discriminatory exclusion of applicants for failing to meet non-job related requirements.

To achieve these goals, the Plan provides for a two-step licensing and selection process. Provisional licensure based upon an unassembled open qualifying examination, will be a pre-condition to placement on eligible lists and initial appointment. All persons placed on eligible lists must possess the experience and education requirements for state certification. Selection for such appointments shall be made by appointing authorities from

among individuals on eligible lists based upon the information furnished by the Board of Examiners and pursuant to selection procedures conducted in accordance with requirements established by the Chancellor. Following one year of provisional service, candidates will be evaluated by the appointing authorities and decisions as to whether or not they shall be permanently licensed shall be made based upon their on-the-job performance.

Additional provisions are set forth in the Plan to assure that it will be open and non-discriminatory, and capable of speedy implemention, as well as to facilitate transition from the current interim system.

I. New Licensing and Selection Procedures

Each of the Plan's two phases--provisional licensure and selection, and permanent licensure and appointment--engages the full resources of the system to assure high quality in licensing and selection.

A. Phase 1

Provisional Licensure.

The provisional phase starts with an open qualifying examination using a profile resume application (P.R.A.) technique. The Board of Examiners will determine candidates' compliance with training, experience and other requirements established by the Chancellor pursuant to State Law. This examination, an unassembled examination to be developed and administered by the Board of Examiners, will consist of a review, verification and analysis of record. The Board of Examiners will establish procedures by which candidates may document their training and experience. On the basis of an evaluation of this material, as well as any other inquiries appropriate to verify transcripts and resumes, the Board of Examiners will determine which applicants are qualified and therefore eligible for placement on an eligible list and for provisional licensure.

Candidates will also be required to participate in a written essay examination developed by the Board of Examiners and administered under proctored examination conditions by the Board of

Examiners. The essay will be designed to demonstrate skills in written expression about matters relating to the position for which application is made, and the Board of Examiners will evaluate and comment on the candidates' written communication skills.

The Board of Examiners will develop profiles of each candidate on the eligible list. The profile will contain the candidate's record and written essay, and the Board's reviews and analyses thereof. These profiles shall be made available to all appointing authorities to which applicants wish to apply for positions.

Provisional Appointment. Selection by appointing authorities is a crucial second step in Phase 1. Safeguards comparable to those developed by the Chancellor during the interim period, under so-called Special Circular 30 procedures, will be continued and will be strengthened. These have required appointing authorities to institute uniform non-discriminatory selection procedures, affording adequate notice to applicants, and involving parents and professionals in a deliberative process subject to review. At present, a monitoring task force from the Board of Education's Division of Personnel supervises the selection process in order to insure such uniform non-discriminatory selection procedures. Under the new Plan, the authorities will be assisted in their assessments of individual qualifications by the profiles. Based on these assessments, provisionally licensed individuals may be appointed to fill vacancies for provisional periods of one year.

B. Phase 2

Permanent Licensure. On-the-job performance evaluations leading to permanent licensure will be made by appointing authorities of persons who have been retained for the entire provisional year of service. The appointing authorities will use a uniform rating and evaluation form developed by the Chancellor in conjunction with the other appointing authorities to assure that evaluations are based upon uniform standards and criteria and actual requirements for successful performance on the job. Upon completion of on-the-job evaluations, appointing authorities shall certify to the

Board of Education whether or not candidates have met the performance requirements. Applicants who meet such requirements will be issued permanent licenses.

Permanent Appointment. Permanently licensed individuals will be eligible for appointment by any appointing authority for the probationary period established by State law.

II Initiation of the New System

The new system will be effectuated immediately on a schedule responsive to current needs. As soon as practicable after the effective date of this Order, the Chancellor will review all titles of supervisory positions for which licenses have been established and the minimum training and experience requirements therefor, and shall order the Board of Examiners to commence Phase 1 examinations starting with those three positions in which the most vacancies exist.

Phase 1 examinations shall thereafter be administered and the first eligible lists promulgated for each title as promptly as administratively feasible.

III Frequency of Step 1 Examinations and Establishment of Eligible Lists for Persons with Provisional Licenses

The Plan is responsive to the parties' long standing concern to maximize the opportunity for qualified minority applicants to compete for supervisory positions. Once an eligible list is established in regard to a particular title, Phase 1 examinations shall continue to be administered and names added to eligible lists on an ongoing, continuing basis so that applications may be submitted at any time and no more than 90 days may intervene between an application and determination of eligibility for provisional licensure. Successful candidates for provisional licensure shall have their names added to eligible lists and shall remain on such lists for a period of four years.

IV Phasing Out of Interim System of Assignment and Licensing

A. Assignment and Appointment:

The interim system of assigning licensed or unlicensed personnel to fill vacancies established by the Final Judgment and Order of July 12, 1973, shall continue with respect to a particular title, until the first new eligible list for such title is established and the first provisional licenses therefor issued, at which time it will terminate with respect to that title. From that time on, appointing authorities shall be free to fill supervisory vacancies in such title with persons who possess such provisional licenses or with persons who possess licenses granted pursuant to the interim system of performance evaluation or with persons who possess licenses granted pursuant to the previous system of examination. Notwithstanding the foregoing, any unlicensed person serving pursuant to a valid assignment in accordance with the interim assignment system at the time such system terminates with respect to the title in which he is serving, may be continued in employment by the appointing authority pending permanent licensure pursuant to the provisions of paragraph B below, and any such individual whose application for on-the-job evaluation by the Board of Examiners was filed prior to the date a new eligible list was established for that title shall be entitled to continue in service in that title as long as necessary to complete such evaluation.

B. Licensing:

The interim licensing system shall terminate for a particular title as of the date the Board of Examiners promulgates the initial announcement of the Phase 1 examination for that title, provided that all unlicensed persons then serving in such title under valid assignment pursuant to the interim system, shall have the option to be evaluated on the basis of their on-the-job performance and to receive permanent licenses pursuant to that system if they have applied or apply for evaluation no later than five months and 1 day following such promulgation date; alternatively, such individuals may elect to have up to five

588a

months of actual acting service in the title credited, together with subsequent service in said position, for the purpose of determining the date they become eligible for on-the-job evaluation by the appointing authority for purposes of permanent licensure under the new system.

V Board of Examiners Staff

This Plan will facilitate conversion by the Board of Examiners to a staffing pattern which avoids its present and almost exclusive reliance on currently employed teaching and supervisory personnel in favor of professionally trained personnel and consultants from the testing and measurement field, as well as from private industry.

No member of the staff shall participate in the development or administration of any test, analysis or evaluation, without having first received appropriate training, with particular emphasis on training in E.E.O.C. testing and validation guidelines. Affirmative action recruitment efforts will be made to attempt to make the staff representative of diverse segments of the community.

VI Reporting Provisions

For a period commencing with the date of this Order and ending two years after permanent licenses have been promulgated for the first three positions for which eligible lists are established pursuant to this Plan, defendants shall comply with the following provisions for collecting, maintaining and furnishing data to plaintiffs' counsel:

A. Phase 1 Examinations

1. Development.

Ten days before the announcement of the holding of any examination, the Board of Education shall provide plaintiffs' counsel with:

a. A statement of the number of vacancies determined to exist in each position for which Step 1 examinations

are announced, a description of experience, training and any other requirements established by the Chancellor for each such position, and all pertinent background information bearing on the establishment or continuance of such requirements. 589a

b. A full description of examination procedures.

2. Administration.

a. The Board of Examiners shall provide plaintiffs' counsel with copies of all examination announcements at the time such announcements are released.

b. Promptly after examinations are held, the Board of Examiners shall provide plaintiffs' counsel with the following:

i. Copies of examinations.

ii. A report on the racial and ethnic character, i.e., black, Puerto Rican or Latin American descent or origin, or other [hereinafter racial/ethnic], of the persons who administer the examination.

iii. A report on the racial/ethnic breakdown of the groups of candidates applying for, taking, passing and failing each each examination. Said reports shall also be submitted to the Court at the times specified.

iv. A copy of the notice given to applicants regarding their right of appeal.

B. Phase 2 Examinations

1. Development.

Defendant Board of Education shall furnish plaintiffs' counsel copies of all rating, evaluation and any other forms and/or instructions furnished to appointing authorities for use in on-the-job evaluations. These shall be made available immediately following their

first distribution to appointing authorities for comment or otherwise, but in no event later than two months before the first on-the-job evaluation in which they are to be used.

2. Administration.

Commencing 15 months after the promulgation of the first new eligible list to be established pursuant hereto, defendant Board of Education will submit to plaintiffs' counsel and the Court quarterly reports on the conduct and outcome of on-the-job evaluations of persons on such lists, including:

a. Number of applicants for on-the-job evaluation from each promulgated list since last reporting;

b. Number of evaluations of applicants from each list;

c. Pass-fail data for applicants from each list by race/ethnic group and community school district or other appointing authority.

C. General.

Defendants shall make available to plaintiffs' counsel all other data, studies, analyses and reports relevant to the development, administration and implementation of this Plan and generated in the course of said development, administration, or implementation.

LEGAL FILE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

591a

BOSTON M. CHANCE, LOUIS C. MERCADO et al.,

Plaintiffs:

-against-

THE BOARD OF EXAMINERS, et al.,

Defendants:

AFFIDAVIT

70 Civ. 4141

STATE OF NEW YORK)
:
COUNTY OF KINGS)

ROBERT CHRISTEN, being duly sworn, deposes and says:

1. I am Vice President of the Board of Education of the City of New York, and am fully familiar with all of the facts and circumstances herein.

2. I submit this affidavit in support of the motion of the New York City Board of Education and Chancellor of the City School District for an order approving the modified Plan for licensing and selecting supervisors in the New York City school system annexed hereto as Exhibit "1," and permitting the defendantsto develop a new supervisory selection and licensing system in accordance with this modified Plan.

3. The Plan for a new supervisory selection system submitted herewith for approval constitutes a modified version of the Plan approved by this Court in its Order of March 25, 1975.

4. This March 25, 1975 Order resulted from an initial finding by this Court on July 14, 1971, and affirmed by the Court of Appeals on April 5, 1972, that the examination for supervisors in the city school system, prepared and administered by the Board of Examiners had the "effect of discriminating against Black and Puerto Rican candidates." This Court further found that the Board of Examiners could not satisfy its burden of demonstrating that its examinations were job-related, holding specifically that "the board has not, in practice, achieved the goal of constructing examination procedures that are truly job-related."

5. The Plan for a new supervisory selection system submitted herewith for approval constitutes a modified version of the Plan approved by the Court in its Order of March 25, 1975.

6. This modified version of the Plan would enable the defendants to implement a non-discriminatory and job-related permanent selection system and also bring an end to the interim selection system and to this litigation, in the most expeditious and economical manner feasible. By contrast, an attempt to implement the original Plan would delay institution of a permanent system for many additional months and indeed, probably, years, utilizing procedures that are very costly and complicated, at the same time offering no assurance that the resultant system would be non-discriminatory and job-related.

7. The modified Plan constitutes a simplification of the original Plan, eliminating many time-consuming steps. Thus, for example, the Board of Education would not be required under the modified Plan to conduct elaborate job analyses for each of the approximately 44 supervisory job titles. Conduct of such analyses under the Original Plan for just three titles consumed 6 months at a cost of $36,699 and resulted, as indicated below, in job analyses which had to be rejected because of their inadequacy. The modified Plan also simplifies the Phase 1 examination, which will mean that new eligible lists can be prepared by the Board of Examiners in a fraction of the time and at a fraction of the cost, that would have been required under the original Plan. The Phase 1 examination under the modified Plan more closely resembles current practices in government, industry and institutions of higher learning. The modified Plan also provides for drastically simplified reporting provisions as compared to the original Plan.

8. The simplicity of the modified Plan, the reduction of the burden imposed on defendants, and the consequent reduction in the time that will be required to implement it is illustrated by a comparison of the relative length of the two plans--the original Plan was 25 pages in length, supplemented by

several pages relating to the reporting provisions of that Plan which were contained in paragraph VII of the March 25, 1975 Order. The modified Plan is a total of 8 pages which include all necessary reporting provisions.

9. The modified Plan retains, however, the essential elements of the original Plan: (1) an evaluation by the Board of Examiners of all candidates to determine whether they are qualified for placement on eligible lists and provisional licensure; (2) evaluation of all candidates appointed from said eligible lists after one year of service to determine whether, on the basis of their on-the-job performance, they are qualified for permanent licensure.

10. While retaining these essential elements of the original Plan, we believe that the modified Plan is an improvement over the original Plan in that it provides for the development of a supervisory selection system in a simple and more economical way, and with more assurance that the selection system will be non-discriminatory, and as is is more fully described below, is responsive to current needs, whereas the original Plan is not.

11. The defendant Board of Education's instant motion to modify the March 25, 1975 Order and Plan is based on its conclusion that the original Plan is complicated, unwieldy and costly, that portions of it have proved to be unworkable, and that changes in circumstances since March, 1975 require the modifications reflected in the Plan submitted herewith. As set forth below, this conclusion is based inter alia, on the facts that:

(a) The first job analyses conducted pursuant to the Plan proved inadequate and had to be rejected.

(b) The City's present fiscal crisis has required the Board of Education to cut back on expenses. Implementation of the original Plan would be fiscally and educationally irresponsible since it would require expenditure of monies on an inordinately expensive Plan without any assurance that the resultant system would be non-discriminatory and job-related. The modified Plan could be implemented and administered much less expensively, thus freeing up monies for vital educational services. Moreover, the modified Plan is, in

our view, better designed to provide for the selection of qualified supervisors than the original Plan. Therefore the financial savings will be accomplished without any sacrifice in the quality of the permanent selection system.

(c) There are few vacancies in any supervisory positions at the present time, making the development of an elaborate job analysis and Phase 1 examination scheme for each supervisory title, as called for under the original Plan, particularly wasteful.

(d) Our experience with on-the-job evaluations in the past two years have led us to conclude that these evaluations should be conducted solely by the appointing authorities, as they are most familiar with the work done by the supervisor. A separate on-the-job evaluation by the Board of Examiners would not be effective, and would result in a useless expenditure of funds.

(See below for more detailed explanation of paragraphs (a)-(d) hereinabove set forth.)

(a) Rejection of first job analyses conducted pursuant to the Plan.

12. Under the termsof the original Plan, the first step in the implementation of a permanent licensing system required the Board of Education to develop prototypical job analyses for three supervisory positions.

13. In attempting to implement this requirement, the Board of Education hired the American Institutesfor Research (hereinafter referred to as AIR), to prepare job analyses for these 3 titles. These job analyses, which had to be rejected, inter alia, for the reasons set forth below, took 6 months to complete, and cost the Board of Education $36,699.

14. The original Plan provided that job analyses will be subject to review by various educators and groups of educational experts, including a college or university specialist in the relevant area, a personnel specialist from outside the city school syster, et. al., and that these persons and groups will make recommendations to the Board concerning the job analyses, and that "the decision of the Board of Education...shall be final."

15. When the first three job analyses were completed, the Board of Education, as required by the original Plan, proceeded to consult with these various educators and educational groups as to the merits of these analyses.

16. Very strong criticism as to the validity and usefulness of these analyses was raised by various groups and educators, representing a broad spectrum of the educational community.

17. On March 1, 1976, the Chancellor's Advisory Council on the Selection of Acting Supervisory Personnel informed the Chancellor that the Council unanimously rejected these analyses. This Council includes representatives of a broad spectrum of the educational community, among them the organization of 450 City school parent associations (United Parents Association), the Council of Supervisors and Administrators of the City of New York, the Association of Community School Boards, the Association of Community Superintendents, the Anti-Defamation League of Bnai Brith, the Public Education Association, and the Division of Personnel of the Board of Education of the City of New York.

18. A copy of the letter of the Chancellor's Advisory Council rejecting the AIR analyses is annexed hereto as Exhibit "2." As is evident from this letter, some of the reasons upon which the Council based its decision to reject the analyses were that they were vague and confusing, the cost factor, the lack of any assurance that tests based upon the job analyses will produce the best type of supervision, and the lack of evidence that the resulting new examinations would be bias free.

19. The Council further recommended to the Chancellor that he "urge the Board of Education to reject the AIR Report in its entirety and allow us to concentrate, instead, on alternative methods of selecting supervisors. To do otherwise would be time consuming and unproductive."

20. Other strong criticisms of the AIR analyses were included in reports by individual members of the Board of Education, see e.g., Exhibit "3," herein, a memorandum by Board Member Amelia Ashe, and independent consultants, see e.g., Exhibit "4," herein, the report of Dr. Robert Owen.

21. Moreover, the plaintiffs advised the Board of Education and the Corporation Counsel that after formal consultation with testing experts and

educators, they have concluded that the AIR analyses would not provide a valid basis for developing constitutional licensing procedures.

22. Thus, it is cleaf that should the original Plan be adhered to, new job analyses would have to be conducted, involving large expenditures of money, consuming much time, and offering no assurance that they will produce non-discriminatory job-related exams.

23. Under the modified Plan, being submitted herewith, no job analyses are required, and thus, the Plan can be implemented expeditiously, and further, there is little possibility that the examinations called for in the modified Plan would be discriminatory or non-job-related.

24. Moreover, by eliminating the job analyses, Phase 1 of the modified Plan avoids problems of bias and invalidity inherent in the original Plan and job analyses. These analyses required by the original Plan would necessarily have to be based on the views of supervisors that are presently in the system, and most of the present supervisors came into the system via the selection procedures that were held to be discriminatory.

(b) The fiscal crisis facing the city school system.

25. The decision of the Board of Education and the Chancellor to make this motion was considered in relation to many complex and intervening considerations, arising in the midst of the most difficult and unprecedented fiscal crisis ever faced by the city school system.

26. Due to this fiscal crisis, the Board of Education of the City of New York has been subject to unprecedented budget cuts.

27. Effective September, 1975, the Board of Education was directed by the City to cut its annual budget by approximately $250 million. This initial cut necessitated the elimination of thousands of teaching positions, the shortening of the school day, increase in class sizes, as well as the curtailment of many vital educational programs.

28. After having made these initial budget cuts in the amount of $250 million, the Board of Education was further directed by the City, in December of 1975, to implement additional cuts of $37.45 million.

29. It is the intention of the Board of Education to effectuate these budget cuts in such a manner as to minimize the impact upon the school instructional day for youngsters as far as possible.

30. The original Plan involves a vastly complicated and expensive procedure for the preparation of examinations, with little or no assurance that these examinations will achieve their purpose.

31. In addition to the costliness of the job analyses, i.e., the original job analyses cost $36,699, and if the original Plan is adhered to, another job analyses would have to be undertaken, experts at the Board of Education have estimated that the type of testing called for by Phase 1 of the original Plan, would cost, at minimum $150 per applicant, and that the type of testing envisaged by Phase 1 of the modified Plan will cost approximately $25-30 per applicant. Even if the estimate as to Part 1 of the original Plan could be halved, it would still be far more costly than the modified Plan.

32. Moreover, notwithstanding the cost factor, it is the opinion of the Board of Education and of the Chancellor that this modified Plan is better designed to provide for the non-discriminatory selection of qualified supervisors than the old Plan. It is less complicated, easier to administer, and offers little possibility that discriminatory and non-job-related testing devices will be promulgated.

(c) Present personnel requirements in the City School District differ from those envisaged by the original Plan.

33. The original Plan was based on the assumption that the Board of Education would have a need to hire large numbers of supervisory personnel every year.

34. Thus, the Plan contemplated separate examinations for each of the approximately 44 supervisory titles, and defined three positions as "prototypical" because they "cover the largest number of people in the supervisory categories, thus permitting the program to start in a meaningful way." (p9.)The original Plan provided that new licensing procedures should be developed first for these said three positions; principal, elementary school; assistant principal - high school (supervision), and assistant principal, elementary and junior high school.

35. The situation has changed so dramatically since the date of this original Plan, that because of the fiscal crisis and declining pupil registers and school closings, not only is there no present need for any additional

supervisors, but we now have approximately 143 excessed supervisors slated for layoff, with further layoffs scheduled for September of 1976.

36. Thus, it would represent a useless expenditure of time and money to develop individual and complicated examinations for these positions, as required by the original Plan, since there is presently no need whatsoever for any additional supervisors in the school system, in these titles or in any other titles, and we predict that for years to come our need in this area will be minimal.

37. Moreover, should examinations of the type envisaged in the old Plan be developed now, with no need therefor for many years, it is likely that with changed circumstances, in the future, the examinations will be useless.

38. Thus, we submit that since our personnel recruitment need for supervisors in the forseeable future will be minimal, it is our responsibility to avoid expenditures of money for complicated and costly examinations that are not presently needed, and when they are needed, may no longer be relevant.

39. Accordingly, the modified Plan which we are proposing does not involve separate, complicated examinations for each title, but a flexible system which can easily be adjusted to present and future needs.

(d) The appointing authorities rather than examination assistants should conduct on-the-job evaluations, and Phase 2 of the modified Plan incorporates this premise.

(40) Since the implementation of the on-the-job testing procedures in the interim system, two years ago, it has become evident to the Board of Education and the Chancellor, that the persons best suited to evaluate a supervisor's on-the-job performance are the people in the field who come into daily contact with the supervisors.

(41) The concept of an on-the-job examination, called for in Phase 2 of the modified Plan, would be based on actual skills and the demands of the particular job. The determination of whether or not an individual's performance during the first year is satisfactory would be made by the appointing authority (e.g., community superintendent for decentralized district, Chancellor for central program).

(42) In addition to having the rating made by those who are most familiar with the work being done by the supervisor, this would also result in great

cost savings in the examination process since examination assistants would not have to be employed.

(43) Examination assistants are far less qualified than the superintendent to determine whether service and competence is of such quality as to warant licensing leading to probationary appointment.

(44) A separate on-the-job evaluation process by the Board of Examiners would be duplicative of the evaluations conducted by the appointing authorities.

(45) In order to assure that the appointing authorities make evaluations which are based upon uniform standards and criteria, and actual requirements for successful performance on the job, the Chanchellor has developed a comprehensive uniform rating and evaluation form, which has been used with much success by the appointing authorities during the past year, and which will be continued under Phase 2 of the modified Plan.

(46) This motion is entirely proper and consistent with the prior history of this case, and with the statutory responsibilities and duties of the Board of Education.

(47) It is the Board of Education and not the Board of Examiners, that is required by law to "determine all policies of the city district," i.e., the City School District of the City of New York (§2590-a(1) of Education Law). It is the Board of Education , and not the Board of Examiners, that is empowered to prepare and submit to the City the budget for the City School District, and which is required to prevent the incurrence of liabilities or expenses in excess of the amount available therefor. (§2590-i of Education Law)

(48) It is the Board of Education, not the Board of Examiners, that is ultimately responsible for the education of children in the City's schools and for the selection and appointment of the teaching and supervisory personnel for those schools. It is the Board of Education and the Chancellor that have the responsibility under State law for determining the education and experience criteria for each job title and for determining what qualities should be examined by the Board of Examiners and whether and when to ask the Board of Examiners to conduct examinations.

(49) In view of the foregoing powers and duties of the Board of Education and the Chancellor, we submit that it is the responsibility of the Board of Education and the Chancellor to move to modify a supervisory selection plan which is not responsive to the needs of the Board of Education of this City, and whose implementation will result in a large expenditure of funds for the promulgation of a Plan which we believe is unworkable and unlikely to produce the best possible supervisors for the educational system.

(50) A motion to amend the 1975 Order based on changed circumstances would be proper under any circumstances. Moreover, despite the Board of Examiners' protestations to the contrary, it is entirely consistent with the history of this case.

(51) The March 25, 1975 Order was itself the result of a motion by the Board of Education, then joined by the Board of Examiners, to amend the July 12, 1973 final judgment. The 1975 Order was not a consent Order, as characterized by the Board of Examiners. The plaintiffs cross-moved for entry of a different order. As the record clearly indicates, settlement negotiations between defendants and plaintiffs broke down over differences plaintiffs considered fundamental.

(52) The only consent order entered in this case was the July 12, 1973 consent judgment.

(53) The instant motion constitutes the most expeditious way to bring this litigation to an end. Plaintiffs instituted this lawsuit in which the Board of Education, since it has primary responsibility for the conduct of the City's schools, is the primary defendant. Plaintiffs and the Board of Education have spent a great deal of time in the last several weeks attempting to arrive at an agreement which will avoid the necessity of further litigation between them. It is my understanding that the modified Plan filed herewith reflects the product of that agreement.

(54) The Board of Examiners can have no legitimate ground for objecting to our proposed modification of the 1975 Order. The modified Plan would enable the prompt implementation of a permanent selection system that the Board of

Examiners claims it is concerned with. The modified Plan also provides a role for the Board of Examiners consistent with the role it has played in the past. It would conduct open qualifying "unassembled" examinations. Also, there is the added assurance that the modified Plan will more likely result in a selection system that is non-discriminatory than the old Plan.

(55) Finally, it should be noted that the 1975 Order merely permitted and authorized defendants to proceed in accordance with its provisions. It did not mandate such action. Clearly defendant Board of Education, which tried in good faith to implement the original Plan, and which has determined that in view of changed circumstances said Plan should be modified, has in no way violated either the spirit or the letter of the 1975 Order. Rather, in seeking now to modify the Plan incorporated in the Order, the Board of Education is endeavoring to fulfill its obligation to facilitate implementation as rapidly as possible of a permanent new selection system which will be workable, feasible, fiscally responsible, and responsive to current needs, and, since it appears to be satisfactory to the plaintiffs who brought this suit challenging the unconstitutionality of the old selection system, will hopefully bring to a close this six-years of litigation.

S/ Robert Christen
ROBERT CHRISTEN

Sworn to before me this
12th day of April, 1976
NOTARY PUBLIC BY
ROBERT CHRISTEN

EXHIBIT I - **Board of Education's** Modified Plan
(printed at pp. 583a-590a)

602a

CHANCELLOR'S ADVISORY COUNCIL ON THE
SELECTION OF ACTING SUPERVISORY PERSONNEL

March 1, 1976

Mr. Irving Anker
Chancellor
110 Livingston Street
Brooklyn, New York 11201

Dear Mr. Anker:

In accordance with your request for recommendations concerning the A.I.R. Report dated June 1975, the members of your Advisory Council on the Selection of Acting Supervisory Personnel wish to submit the following highlights of their findings.

The Council was unanimous in its opposition to the acceptance of the Report for the reasons indicated below:

1. The Report fails to provide an adequate analysis as required by Court order in that it is filled with vague and confusing descriptions.

2. There is real concern over the cost of developing and administering a new examination system in light of budget stringencies under which we are currently operating.

3. There is no assurance that the job analysis will produce the best type of supervisor for New York City schools.

4. The Report concentrates on "what is" rather than on "what ought to be."

5. There is no evidence that the resulting new examination system will be bias free.

EXHIBIT "2"

On the basis of this review, your Council recommends that you urge the Board of Education to reject the A.I.R. Report in its entirety and allow us to concentrate, instead, on alternative methods of selecting supervisors. To do otherwise would be time consuming and unproductive. In keeping with this recommendation, and if you concur, the Council is prepared to explore specific suggestions for an alternative plan for selecting supervisory staff.

Be assured that we are anxious to be of assistance to you and the Board of Education because we believe that this is an area in which we can make a worthwhile contribution to the school system. We shall wait to hear from you concerning next steps before we proceed.

Sincerely yours,

Blanche Lewis /gb

(Mrs.) BLANCHE LEWIS
Chairperson

BL:gb

ISAIAH E. ROBINSON, JR., PRESIDENT
ROBERT J. CHRISTEN, VICE PRESIDENT
STEPHEN R. AIELLO
AMELIA ASHE
JOSEPH G. BARKAN
JOSEPH MONSERRAT
JAMES F. REGAN

IRVING ANKER, CHANCELLOR
HAROLD SIEGEL, SECRETARY

BOARD OF EDUCATION
OF THE CITY OF NEW YORK
110 LIVINGSTON STREET
BROOKLYN, N.Y. 11201

604a

Chance Mercado

CHANCELLOR

JAN 26 PM 1:40

TO: All Board Members

FROM: Dr. Amelia Ashe

DATE: January 22, 1976

RE: Board Policy Reaction to AIR Report

The Federal Court Order by Judge Tyler in the Chance-Mercado case required the Board to develop a job-related, non-discriminatory examination and a job analysis for all supervisory positions.

The job analysis done by AIR focused largely on the supervisors currently serving and therefore consisted of a determination of current job behaviors. These are the tasks the person performs, the amount of time devoted to these tasks, their relative importance, and the knowledge and skills which enable persons to perform these tasks successfully. The analysis is based largely on current practices. The Court Order also makes allowance for input by the Chancellor and others to indicate the nature of the job as it ought to be. Since the procedure by AIR made no effort to identify only superior supervisors in determining job behavior, it is conceivable that incidents of less than satisfactory behavior are included in the descriptions of supervisors' performance. The group polled in the sample represented proportionately the current supervisory population. The sample group, which is low in minority membership, may give data about their jobs which reflect the biases of the majority group.

Two questions may be raised:

1. If current practice is used as the accepted behavior, will this perpetuate whatever biases, cultural or ethnic, that may prevail in the sample group?

2. If current practice is not ideal, what ought it to be? Why should current practice be perpetuated?

A.I.R. = American Institutes for Research in the Behavioral Sciences

EXHIBIT "3"

The AIR procedure in developing their report basically consisted of a collection of incidents in which supervisors indicated items of importance which occurred as part of their job.

Part II consists of a job inventory checklist developed largely from the incident data and upon which supervisors were asked to indicate the relative time spent in each task and the relative importance of each task. A "minimally acceptable standards questionnaire" was developed by asking the sample group whether or not various behaviors derived from the checklist were necessary to perform minimally in the position.

Supervisors were also asked whether the behavior was necessary to discriminate between marginal and superior supervisors. There is a heavy reliance on the incumbents' perception of their jobs and the perceived amount of time spent in each activity. These estimates may be greatly at odds with reality even for highly qualified personnel.

The review of the incident reports used to derive the checklist appears to be an informal process lacking in proper scientific methodology (e.g. factor analysis). In analyzing the "minimally acceptable standards questionnaire," Modal responses were chosen rather than Mean assessments without rational explanation.

One educator participating in the on-site observations believed that the knowledge/skills checklist (based upon "minimally acceptable standards questionnaire") should include aspects of interpersonal skills. This idea was rejected because AIR thought such evaluations to be too global or unreliable.

The knowledge/skill checklist indicates that while many specific behaviors which use interpersonal skills are listed, these skills do not represent adequately the full range of skills necessary for a minimally acceptable supervisor. And even if they did represent the full range the measures used are insufficient. It may be that the most intangible skills are the most important. A test which does measure such skills would be extraordinarily difficult to develop.

The AIR Report implies a complete interchangeability among supervisors. AIR suggests that, in order to maintain maximum flexibility, specialized skills in specific areas need not be part of a general license. AIR recommends a consolidation of testing to create a test (for all supervisors) which measures tasks or skills common to all supervisory positions. This recommendation raises a fundamental question: Once a supervisor is selected, can (s)he then be used interchangeably in a variety of subject areas? (e.g. can (s)he supervise with equal skill French or Special Education or Gym?)

The feasibility of limiting a job analysis to incumbent behaviors is questionable. These behaviors contain many undesirable as well as desirable components. Through sampling error, or absence of a specific skill in the population sampled, many essential or desirable behaviors may be omitted.

It is not clear that the court wished to limit the job analysis to current practices. The plan adopted by the court acknowledges the right of the Chancellor and others to review and include matters in the job analysis beyond the catalogue of incumbent behaviors.

Equally important to the Board should be a concern for the intended use of the job analysis. We have a catalogue of behaviors, but how they relate to performance has not been demonstrated. The relative importance of these items may have little or no relationship to what is actively required of minimally acceptable or superior supervisors. Factor analysis might have been applied to the collected data to ascertain which of the areas within the job analysis are related. An appropriate method for developing an instrument based on this analysis must employ methodology such as multiple regression to determine the factors, and the weights of those factors, to predict the ability of a supervisor to function up to minimal standards as well as the ability of a supervisor to function in a superior manner. The use of a catalogue of skills and knowledge without concrete demonstration of relationship will probably fall eventually into the same areas of disrepute into which previous exams have fallen. That is, it will be increasingly obvious that "job-related tests" test only that knowledge and skill which incumbents in 1975 believed to be of importance. It should be noted that examiners in the past have also drawn from the ranks of incumbents, in effect "the establishment."

AA:RH:SC:ps

cc: Mr. Irving Anker
Mr. Harold Siegel
Mr. Gary Sousa

TEL. 516-587-2066

ROBERT G. OWENS, PH.D.
CONSULTANT TO EDUCATIONAL ORGANIZATIONS
2 GAMECOCK LANE
BABYLON, NEW YORK 11702

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SECRETARY
BOARD OF EDUCATION

607a

September 8, 1975

Mr. Harold Siegel, Secretary
Board of Education
110 Livingston Street
Brooklyn, N.Y. 11201

Dear Mr. Siegel:

As you requested, I have reviewed Figures 12, 13, and 14 of Prototype Job Analyses of Three Supervisory Positions Within the New York City School System. I note that this material was not before me at the time that I prepared my letter of August 16.

These summaries of questionnaire responses confirm my view that the investigation was appropriately based upon data required by its design. Further, the additional data provide a useful response to my concern about the vagueness of such terms as "managing" and "providing" as they were used in the study. If the breakdown provided by Figures 12-14 had been included in the original report or, better yet, if the information contained in the Figures were discussed more clearly in the body of the report my comment that "various 'duty areas' are vague as stated . . . " would not have been made on page 3 of my letter.

Otherwise, on the basis of the material submitted to me, my review of the study conducted by American Institutes for Research remains as stated.

Sincerely yours,

Robert G. Owens

Robert G. Owens

EXHIBIT "4"

TEL. 516-587-5066

ROBERT G. OWENS, PH.D.
CONSULTANT TO EDUCATIONAL ORGANIZATIONS
GAMECOCK LANE
BABYLON, NEW YORK 11702

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BOARD OF EDUCATION

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August 16, 1979

Mr. Raymond Greenstein, Administrator
Office of Training Services
Bureau of Pre-Professional Training and Career Development
Board of Education of the City of New York
38 Park Row
New York, N.Y. 10038

Dear Mr. Greenstein:

At your request I have reviewed the job analyses prepared by the American Institutes for Research. Specifically, this report of that review is based upon five documents which have been made available to me:

1. Prototype Job Analyses of Three Supervisory Positions Within the New York City School System,
2. Appendix A: Incident Collection Forms,
3. Appendix B: Job Inventory Checklist Procedures, On-Site Observation Procedures,
4. Appendix C: Reports of Community School District Visits - Abstract of Incidents,
5. Appendix D: Judgments of Minimally Acceptable Standards.

My review is based upon these documents.

Description of the Analyses. As consultant to the New York City Board of Education, American Institutes for Research endeavored to produce prototypical job analyses for three supervisory positions:

* Principal of Elementary School,
* Assistant Principal of Elementary, Intermediate and Junior High Schools,
* Assistant Principal (Supervision) in Day Academic and Vocational High Schools.

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The documents make it clear that the consultant firm sought not merely to produce job analyses of these positions, but to exemplify a methodology for producing job analyses of other, related, positions. The context for all of this is the Chance-Mercardo court case and the goal is to lay the groundwork for more effective examinations and licensing procedures. The work done in this instance by American Institutes for Research has considerable potential for long-term impact upon licensing procedures for supervisors in the New York City schools.

Procedures employed. The job analyses were conducted utilizing three approaches to data collection:

1. critical incident reporting,
2. job task inventory,
3. on-site observations.

The consultant firm chose to call this a multimethod approach and freely admits that this choice was theirs in lieu of methods suggested by the chancellor, the Board of Education, and the Board of Examiners.

Essentially, the so-called multimethod utilized to conduct the job analyses was a complex self-report technique which sought to have role incumbents provide information as to the work they did and their views concerning minimum standards for performing such work. This fact becomes crucially important when we realize that the consulting firm is not merely purporting to have performed a job analysis of each of three supervisory positions, but also proffers their methodology as a prototype for similar analyses to be done of many other positions.

Analyses and interpretations made by the consultants. Within the limitations imposed by their study design and data-gathering procedures, the analyses and interpretations reported by the consultant firm are appropriate and well-supported by their data. Within the limitations imposed upon such an investigation by the "real" world in which they were operating, their sampling procedures, item generation and validation procedures, and other data-generating procedures were carefully carried out in highly appropriate ways.

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Conclusions reached by the investigators. The investigators identify and describe a number of conclusions in discursive fashion (pp. 123-127). Among these are the following:

1. ". . . that the procedures used and the general results obtained are applicable to all 14 of the school supervisor positions" (which are included in the Agreement between the Board of Education and the Council of Supervisors and Administrators).

Comment. Due to serious limitations imposed upon this study by critical factors of the research design, this conclusion is highly conjectural. Further comment on this general notion is made below under the discussion of the limitations of the research.

2. That Instructional Administration, Personnel Administration, Community-School Administration, and School Administration are four broad elements which are ". . . unquestionably common to the successful operation of any school organization" and, further, that 19 "duty areas" are also common elements that are generally applicable to all school supervisory positions (pp. 123-124).

Comment. There is sufficient internal validity in the study to warrant the use of this idiosyncratic analysis. It would have been helpful to have indicated how the various "duty areas" are subsumed under the respective "elements". The "duty areas" are vague as stated because such terms as "establishing", "providing", "selecting", "organizing", "managing", and "promoting" are not defined behaviorally - or, indeed, in any other way. In terms of on-the-job behavior, such a list is open to a range of interpretations as to what would be appropriate. There is data in the research report which would enable such clarifications to be made in systematic behavioral terms.

3. That supervisory positions will, to some extent, share these "broad elements" in common and will also deal with specialized elements that are not shared universally by all supervisory positions. Further, that by emphasizing the common elements of various supervisory positions it should be possible to reduce the number of supervisory titles involved in examination and licensing procedures (pp. 125-126).

Comment. Not only is this conclusion supported by the data generated in the study, it reflects a view widely held in the profession. The "concept of a single license" (p. 126), for example, has been a basic concept underlying certification practices in New York State for some years (there being, in fact, only one form of certification to cover all school-building-level supervisory positions).

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4. "The data also give some credence to the concept of a single license for both principals and assistant principals at the elementary school levels with perhaps some minimum period of tenure as an assistant principal before bing assigned as a principal." (p. 126 - emphasis added).

Comment. While the data presented in the report does give some credence to the concept of a single license, the notion of requiring a period of tenure as assistant principal prior to assignment as principal does not appear to be derived from the data. This point appears to be gratuitous speculation and should, in itself, be studied before being stated as a conclusion based upon analysis. What evidence is there, for example, that the job behavior of principals who had served as assistant principals differs systematically from those who have not served in that capacity ?

5. Overall licensing procedures should contain two major segments: (1) examination prior to assignment, and (2) on-the-job evaluation after assignment (pp. 126-127).

Comment. This is, of course, a time-honored recommendation customarily proffered by those concerned with evaluating the qualifications of individuals prior to professional service. While this conclusion does not appear to be derived from the research data, it is not in conflict with it and is good common sense. The investigators are helpful, however, in suggesting ways in which findings of this study may be useful in on-the-job evaluation.

Limitations of the research. An appraisal of this study - which purports not only to yield job analyses of three supervisory positions but also to offer a prototypic model for conducting such analyses for other positions in the future - requires some consideration of the limitations imposed by the research design which has been utilized. There are several important factors in the design of this particular study which raise serious questions concerning the broad claims of the investigators that they have, in fact, produced job analyses that are appropriate for examination and licensing procedures on the one hand and a prototypic model for developing job analyses on the other hand. These limitations in the design of the study are revealed most clearly by what is not said in the report.

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1. In developing their self-report "multimethod", it is noteworthy that the investigators sought data exclusively from (1) incumbents, (2) their superordinates(who are former incumbents), and (3) a small number of Community School Board members. There is no evidence that systematic data was sought from the subordinates over whom the incumbents have supervisory authority. Thus the study is bereft of information as to the impact that the various job-behaviors and roles which supervisors have assigned to themselves is experienced by those who are supposed to be the chief beneficiaries. Yet there are few issues in the realm of supervision which have attracted more attention than the discrepancy between the views of supervisors and their subordinates as to what constitutes effective supervisory behavior. There is, therefore, a strong possibility that the activities which the supervisors think of as "good" and "effective" may be viewed in quite different terms by teachers.

One brief illustration may be helpful. Predictably, the researchers found that supervisors tend to view themselves as teachers of teachers and - as such - deem it important for them to give model demonstration lessons for the edification of their subordinates. This is a persistent tradition among supervisors in New York City schools and, yet, is the kind of work activity which few students of supervision would expect to be very effective. It is remarkable - and a defect in the study's design - that the efficacy of this job behavior was not checked with the perceptions of those whom it is supposed to benefit.

This design problem assures that the job analyses will be dominated by the values and traditions of the incumbents and their superordinates (former incumbents) and tends to establish the norm that job analyses should be undertaken in such a manner.

2. The design of the study assures that influence of those outside of the existing ranks will be minimized. Thus, the study is innocent of any reference to other research or scholarly thought, and no expert opinion was sought in establishing the appropriateness of the "elements" and the "duty areas" which were finally identified.

Again, a brief illustration might be helpful. On p.124 the investigators state: ". . . all of these elements must be handled by the team of first-line supervisors who directly run the school" (emphasis added). This concept of team-functioning is crucial to contemporary concepts of school

supervision. Indeed, in my own work with principals of New York City schools I increasingly hear expressions of need for greater team-work between assistant principals and principals. Yet, the study does not identify the skills of team-membership and effective group participation as important "elements" or "duty areas".

Contact with contemporary literature on supervision and students of the field may well have avoided this type of pitfall.

3. The study did not seek to be qualitative in either (a) the gathering of data or (b) establishing minimally acceptable standards of performance on the job. The study does not reveal any distinction between the behavior of those supervisors who are deemed successful (by any standard) from those who may be less successful. Thus, we have merely a statement of what an undifferentiated group of supervisors do on the job. One might suppose that a study aimed at setting standards for licensing would seek to distinguish the performance of superior supervisors from that of others. The effort reported in the study to establish some sort of norm for minimally-acceptable standards for performance is subjective without any independent refereeing or rating of performance.

4. In a setting which is characterized by rapid change and the need to deal with that dominant fact, the study is singularly present-oriented and the prototypic model which it seeks to establish is notably lacking in morphogenic characteristics. The investigators could have greatly strengthened the utility of their findings by seeking to obtain from their respondants, perhaps by using the Delphi technique, some expert future-oriented opinions focused on what supervisors in New York City schools will need to be able to do in the predictable future rather than to confine their study exclusively to what job-skills have been needed in the past. This tends to reinforce a tendency in American school supervision which has evoked a great deal of criticism: Namely, that it has responded too little and too late to rapidly changing events and has tended to rigidly perpetuate the dogma of the past.

Sincerely yours,

Robert G. Owens

Board of Examiners' Notice of Motion dated April 20, 1976, together with supporting affidavits of Murray Rockowitz, Julius R. Rubin, and Saul Z. Cohen (plus exhibits), sworn to April 19, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

BOSTON M. CHANCE, et al., :

Plaintiffs, :

-against- :

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - - x

NOTICE OF MOTION

70 Civ. 4141
(M.P.

OFFICE OF CORPORATION COUNSEL
76 APR 20 PM 3:
LAW DEPARTMENT
CITY OF NEW YORK

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavits of Murray Rockowitz, Julius R. Rubin and Saul Z. Cohen, all sworn to April 19, 1976, and upon the Consent Judgment entered July 12, 1973 as modified by the Order entered March 25, 1975 (the "Consent Judgment") and the pleadings and all other papers and proceedings had herein, defendant Board of Examiners will move this Court, at the United States Courthouse, Foley Square, New York, New York, at a date and time to be designated by this Court, for an order:

(a) Pursuant to paragraph XIV of the Consent Judgment and Rule 70 of the Federal Rules of Civil Procedure, implementing the Consent Judgment by authorizing and directing defendant Board of Examiners to prepare, at the expense of the Board of Education, job analyses for the three prototypical positions described in the Plan for plenary examinations for supervisory personnel in the New York City school system which is part of the Consent Judgment in accordance with, and as required by, that Plan, on the ground that defendant Board of Education has failed and refused to obey the Consent Judgment by adopting such job analyses; and

(b) Granting such other, further and different relief as this Court may deem just and proper.

Dated: New York, New York
April 20, 1976

Yours, etc.,

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Defendant Board of Examiners

By _____
A Member of the Firm

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759-8400

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New York, New York 10011

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BOSTON M. CHANCE, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

- x

70 Civ. 4141
(M.P.)

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MURRAY ROCKOWITZ, being duly sworn, deposes and says:

1. I am a member of the Board of Examiners and have held that position since September 1966. From September 1971 to September 1975, I was Chairman of the Board of Examiners. I am fully familiar with all aspects of this matter and submit this affidavit in support of the Board of Examiners' motion to require immediate implementation of the Consent Judgment, as modified, by authorizing and directing the Board of Examiners to prepare job analyses for the three prototype supervisory positions described in the Plan which is part of that Judgment.

Introduction.

2. By statute, the Board of Examiners is expressly given the responsibility of preparing and administering objective plenary examinations for supervisors in the New York City school system. In order to give future

supervisory examinations wider community acceptance, the Board of Examiners agreed in 1973 to a two-part settlement of this case. That settlement resulted in the entry of the July 12, 1973 Consent Judgment. The first part of the settlement called for the implementation of an "interim" selection and licensing system whereby licenses could be obtained by the large number of supervisors who had been appointed on an "acting" basis during the pendency of this case, and others who would be similarly appointed before a permanent Plan for plenary examinations was implemented. The second part of the settlement called for the development of such a permanent Plan by a Task Force consisting of the parties and their designees. The "interim" system was implemented in 197[illegible]nd the parties submitted an agreed upon Plan to Judge Tyler in May 1974. Thereafter, Judge Tyler approved the Plan in January 1975 and formally made it part of the Consent Judgment in March 1975.

3. Under the Plan, the Board of Education is to adopt job analyses for three prototypical supervisory positions, utilizing an independent consulting firm, so that the Board of Examiners can, in turn, prepare prototype examinations for those positions utilizing its independent consulting firm. In the future, the prototype analyses and examinations are to serve as models for the preparation of analyses and examinations for all supervisory positions.

4. It is now over 22 months since the Plan was initially submitted to this Court, about 15 months since Judge Tyler approved it and over a year since it was formally made part of the Consent Judgment. Yet, the Board of Education has still not adopted the prototype

job analyses required under the Plan. Since the Board of Education is unwilling to do so, the Board of Examiners has made the instant motion for an order authorizing and directing it to prepare the prototype job analyses. Only by entry of such an order can the Board of Examiners proceed with the preparation and administration of the prototype examinations which are necessary to implement the Judgment, and thus fulfill its statutory responsibility.

New York State's Constitution and Education Law.

5. New York State's Constitution and Education Law require that all civil service appointments shall be made by "objective" examinations to determine "merit and fitness" and that the Board of Examiners shall "prepare and administer" those examinations for all supervisory positions in the New York City school system.

6. Article 5, Section 6 of the New York State Constitution requires that:

> "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained as far as practicable, by examination, which, as far as practicable, shall be competitive. . . ."

7. The New York State Education Law repeatedly provides that the examinations required by New York's Constitution must be "objective" and must be "prepare[d] and administer[ed]" by the Board of Examiners. Thus, Section 2569(1)(a) of the Education Law provides that:

> "It shall be the duty of the board [of examiners] to hold examinations whenever necessary, to examine all applicants who are required to be licensed or to have their names placed upon eligible lists for appointment in the schools . . . , and to prepare all necessary eligible lists. . . ."

Similarly, Section 2590-j of the Education Law provides:

> "3. (a)(1) The board of examiners shall prepare and administer objective examinations to determine the merit and fitness of all candidates for . . . supervisory service positions. . . ."
>
> * * *
>
> [b.] (3) The board of examiners may establish an eligible list for any class of positions for which it finds inadequate numbers of qualified persons available for recruitment."

In addition, Section 2573(2) provides, in part:

> "The superintendent of schools shall require the board of examiners, in anticipation of the reasonable needs of the school system, to conduct examinations so that eligible lists may be ready for promulgation as soon as vacancies come into existence. Where vacancies already exist and cannot be filled because eligible lists have been exhausted, the superintendent of schools shall require the board of examiners to hold examinations forthwith. . . ."

The Consent Judgment.

8. After the Court of Appeals for the Second Circuit affirmed the issuance of a preliminary injunction herein, defendant Board of Examiners moved, by notice of motion dated June 1, 1972, to modify that preliminary injunction to permit new plenary examinations pursuant to a system which was submitted with that motion. On the return date of the motion, Judge Mansfield suggested that it would be preferable for the parties to reach agreement on a system for new examinations since the Court was not as well equipped to resolve the educational and other issues raised by the motion. Accordingly, at Judge Mansfield's suggestion, a decision on the motion was deferred while the parties negotiated to see whether they could reach agreement upon a plan for such new examinations.

9. In light of the provisions of the New York Education Law quoted above, the Board of Examiners did not have to engage in such negotiations with plaintiffs and others.* It did so out of a desire to give its new examinations greater community acceptance.

10. In any event, during the negotiations between the parties, which commenced shortly thereafter, the parties agreed to a two-part settlement. First, an "interim" selection and licensing system using on-the-job performance evaluations would be implemented so that "acting" supervisors expeditiously could obtain licenses. Second, a permanent Plan for a comprehensive system of plenary examinations would be developed by the parties. On or about April 2, 1973, a Stipulation of Settlement between the plaintiffs, the Board of Examiners and the Chancellor of the City School District was submitted to the Court.**

11. On July 12, 1973, after a number of hearings, a Consent Judgment*** was entered with respect to all

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* Moreover, it was clear from both Judge Mansfield's decision granting a preliminary injunction and from the Court of Appeals' decision (see below) that plenary examinations could and should be devised to meet the objections raised by plaintiffs.

** The Stipulation of Settlement provided that it ". . . is entered into as a compromise of a disputed claim" without defendants admitting any of plaintiffs' allegations. (Stipulation, para. VI.)

*** The Consent Judgment provided, inter alia, (1) that it was based upon the Stipulation of Settlement and the Court's approval of it (Judgment, para. I.B.); (2) that entry of it ". . . shall not constitute any determination of wrongdoing or misconduct on the part of any party . . ." (Judgment, para. XIII); (3) that, except insofar as plaintiffs' claims were resolved by the terms of the Judgment, they were "dismissed with prejudice on the merits" (Judgment, para. XI); and (4) that plaintiffs and members of plaintiffs' class were enjoined from "instituting or prosecuting any suit or other proceeding" to enforce claims "included in or comprehended by" any of plaintiffs' claims since plaintiffs' claims were being "compromised, settled and extinguished" (Judgment, para. XII).

parties other than the Board of Education and, as noted below, a parallel order was entered with respect to it so that the "interim" system could be implemented. (A copy of that Consent Judgment is annexed hereto as Exhibit A.)

12. The Board of Education refused to sign the Stipulation of Settlement because, in its judgment, the settlement would grant permanent appointments or licenses to supervisors without compliance with New York's constitutional and statutory scheme. Plaintiffs moved to enter a default judgment against the Board of Education on the ground that it had never answered. Although Judge Mansfield denied that motion, he modified the preliminary injunction against the Board of Education so that its terms were virtually identical to those of the Consent Judgment.

13. The Consent Judgment expressly provided that it would subsequently be modified to incorporate, and permit implementation of, a permanent Plan for a comprehensive system of plenary supervisory examinations. (See paragraphs VII, VIII, IX, X and XIV of the Consent Judgment.)

The Plan for Plenary Examinations.

14. During late 1973 and early 1974, the parties continued to negotiate with respect to such a Plan. Finally, on May 24, 1974 all parties jointly submitted a Plan for plenary examinations to Judge Tyler. All parties had jointly developed and agreed upon that Plan -- with the exception of two issues (the method of selecting consultants and reporting provisions) which are not here in dispute and which the parties agreed to submit to the Court for resolution.

15. Defendants moved on December 20, 1974 to resolve the open issues in their favor, to have the Plan approved, to incorporate the Plan with the terms of the Consent Judgment and to permit the administration of plenary supervisory examinations pursuant to the Plan. Then plaintiffs moved on January 3, 1975 to resolve the open issues in their favor and, like defendants, to approve the Plan. The only differences in the Plan as submitted by the two sides related to the two open issues.

16. At a hearing on January 14, 1975 with respect to the motions, Judge Tyler approved the Plan and endorsed a memorandum decision on defendants' motion papers to that effect. It reads in part:

> "In essence, then, the plan as set forth in the appendix to the affidavit of Dr. Murray Rockowitz verified on December 20, 1974 is approved."

17. Thereafter, the two open issues were finally resolved and, on March 25, 1975, an "Order Modifying Final Judgment and Order" was entered. That order (a copy of which is annexed hereto as Exhibit B), "approved" the Plan and formally incorporated it within the Consent Judgment:

> "WHEREAS, all parties herein agreed upon a Plan for such plenary examinations, except that they did not agree on the method of choosing the consultants to be used by defendants under the Plan and they did not agree upon a reporting provision, and they submitted the Plan to this court on May 24, 1974; . . . .
>
> * * *
>
> VI. The Plan for a comprehensive system of plenary examinations for supervisors in the New York City School System which was annexed as an exhibit to the affidavit of Murray Rockowitz, sworn to December 20, 1974, and a copy of which is annexed hereto and made a part hereof (the

"Plan"), is approved as herein modified* and, notwithstanding any other provision in the July 12, 1973, Judgment and Order, defendants are permitted and authorized to develop examinations for supervisory positions and thereafter to administer and conduct such examinations, to process and grade such examinations, to promulgate eligible lists and to issue licenses based upon such examinations, all in accordance with that Plan."**

18. In short, the contents of the Plan, which had been jointly developed and agreed to by all parties, had been known since May 1974, the Plan was approved by Judge Tyler in January 1975 and it has been formally part of the Judgment since March 1975.

The Board of Education's Responsibilities Under the Plan With Regard to Job Analyses.

19. By its terms, the Plan "outlines a procedure for the development of examinations by the Board of Examiners to fulfill its statutory responsibility" to provide "objective", non-discriminatory examinations to determine "merit and fitness" (Plan, p. 1). The new examination

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* The only modifications in the Plan made by the Court related to reporting provisions.

** The Order also made the Consent Judgment, as modified, applicable to defendant Board of Education, in accordance with its consent. Thus, the Order provides:

> "Whereas, the court has received a letter dated March 10, 1975, from the Board of Education indicating its consent to the entry against it of the Final Judgment of July 12, 1973, previously entered against the Board of Examiners; . . . .
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> * * *
>
> IV. As of the effective date of this Order, the provisions of the Final Judgment of July 12, 1973, as modified, shall apply fully to all of the defendants, and all the defendants shall be bound thereby."

procedures are to be a two-step process. First, a "Step 1" plenary examination will be administered to all applicants to screen out "those who fail to meet levels of minimum acceptable performance". Persons who pass will receive a provisional license. This examination is to be prepared by the Board of Examiners based upon a job analysis of the supervisory position prepared by the Board of Education. Second, a "Step 2" on-the-job performance evaluation will be administered by the Board of Examiners to persons who have a provisional license and who serve on the job in a position for one year. Those who are successful are to receive a permanent license.

20. Initially, the Plan requires the Board of Examiners, utilizing an independent consulting firm, Development Dimensions, Inc.,* to prepare Step 1 examinations for three prototypical supervisory positions. Before those prototype examinations can be prepared, however, prototype job analyses are to be developed by the Board of Education utilizing its independent consulting firm, American Institutes for Research.** Both the prototype job analyses and the prototype Step 1 examinations are then to serve as models to aid in the preparation of analyses and examinations for each supervisory position.

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* At the end of June 1975, the Board of Education entered into a contract with Development Dimensions, Inc. whereby that firm is to develop the prototype examinations for the Board of Examiners. Partial payment has already been made to Development Dimensions under that contract.

** Well prior to the entry of the March 25, 1975 order, the Board of Education had already chosen American Institutes for Research ("A.I.R.") as its consultants to develop job analyses. It would appear that a contract between the Board of Education and A.I.R. had already been signed by that date.

21. An examination of the terms of the Plan conclusively demonstrates that it is mandatory and directory, rather than discretionary, insofar as it requires the Board of Education to adopt job analyses for the prototypical positions and insofar as it requires the Board of Examiners to then prepare the three prototype Step 1 examinations.

22. Initially, the Plan describes the Board of Education's function in the development of job analyses for supervisory positions:

> "The Board of Education, in consultation with the Board of Examiners and other interested persons and groups, will develop job analyses for all positions for which the Board of Examiners is required to conduct examinations. The job analysis will be based. . . ." (Plan, p. 2) (Emphasis added)

23. In describing the data from which job analyses will be prepared, the Plan states: "As a general rule, the job analysis will be developed from data which will be accumulated in the following way. . . ." (Plan, p. 3) (Emphasis added)

24. The Plan indicates that ". . . to insure the soundness of the job analyses" the Board of Education "will subject each analysis to review by . . ." a group of designated persons such as community school board superintendents and incumbent supervisors. The Plan provides that "the final selection" of such persons "shall be by decision of the Board of Education". (Plan, p. 5)

25. Although the designees are to review each job analysis and make recommendations with regard to it, the Plan provides that "the decision of the Board of Education, however, shall be final". (P. 5) (Emphasis added)

26. Next, the Plan provides that the Board of Education "shall" prepare job analyses from the data described in the Plan:

> "Based on the data developed in '1' above, the Board of Education shall prepare a job analysis and description for each position for which examinations are to be conducted. This job analysis shall set out and fully elaborate all of the important qualities and/or behaviors necessary for performance of the job." (P. 5) (Emphasis added)

27. The Plan then provides that job analyses for three prototypical positions shall be prepared by A.I.R., the Board of Education's independent consulting firm. Thus, the Plan states:

> "In order to insure broad public acceptance as to the objective implementation of the procedures set forth herein and in '1' above the Board of Education will retain a recognized consulting firm to develop and prepare the first three job analyses as prototypes pursuant to the procedures set forth herein and in '1' above and/or such other procedures as the firm deems appropriate. The prototype analyses shall cover the positions of Principal - Elementary School, Assistant Principal - High School (Supervision), and Assistant Principal - Elementary and Junior High. These positions cover the largest number of people in the supervisory categories, thus permitting the program to start in a meaningful way. These analyses will thereafter serve as models for future job analyses to be developed by the Board of Education."
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> * * *
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> "The Board of Education has designated American Institutes for Research, 3301 New Mexico Avenue N.W., Washington, D.C. 20016, as its consultant in connection with the development of job analyses for prototype examinations." (Pp. 6-7)* (Emphasis added)

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* The Plan also provides that the Board of Education may use consulting firms "in the development of future job analyses". (P. 7)

28. After job analyses prepared by the Board of Education and/or its consultants have been completed, the Board of Examiners are to develop plenary supervisory examinations based upon them. Thus, the Plan states:

> "The Board of Examiners will develop examinations based on the aforesaid job analyses which measure the applicant's capacity to perform the significant job requirements as indicated by the analysis. This examination process will be divided into two steps. Step 1 will consist of a series of tests to be given to all eligible applicants for the primary purpose of evaluating the applicants' strengths and weaknesses. All persons who meet levels of minimum acceptable performance under Step 1 shall be declared eligible for provisional appointment to the position in question. Step 2 of the examination process will be administered to those persons who secure such provisional appointment. It shall consist of an on-the-job performance evaluation at the end of one school year of provisional service. Any person found to be performing reasonably in the Step 2 evaluation shall be awarded a permanent license for the position in question." (P. 8)

29. Finally, the Plan provides that the "interim" on-the-job performance evaluation system is to be phased out ". . . one year from the date of the announcement by the Board of Examiners of the last of the aforementioned three prototype examinations." (P. 18) Thus, until the three prototype examinations are prepared and announced, the "interim" system -- which the Board of Education has contended does not meet the requirements of State law -- will stay in effect.*

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* In 1973 and 1974 the Board of Education argued that the "interim" on-the-job performance evaluation system violates the requirements of New York State's Constitution and its Education Law and that it was "imperative" that a Plan for plenary examinations "consistent with constitutional requirements" be adopted as expeditiously as possible. (See letter dated April 2, 1973 from Leonard Bernikow, Assistant Corporation Counsel, to Judge Mansfield.) After its position was rejected in

The Board of Education Has Failed and Refused to Adopt Prototype Job Analyses.

30. As noted above, the jointly developed Plan for plenary examinations was originally submitted to this Court in May 1974; and the Court approved it in January 1975 and made it a part of the Consent Judgment in March 1975. Yet, the Board of Education has not, to date, come forward with prototype job analyses acceptable to it. The Board of Education's default in this regard delays the Board of Examiners' ability to prepare the prototype examinations and, thus, has the effect of keeping this case in an unfinished state.*

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this Court, the Board of Education appealed to the Second Circuit and argued:

> "It was improper to direct that permanent appointments be made without compliance with the requirements of the State's constitutional and statutory requirements of merit and fitness determined by competitive examination. Such a direction would be improper even in a final judgment since the alleged discrimination could be cured by requiring proper methods of testing without any need for disturbing the State's constitutional and statutory requirements." (Brief of Appellant Board of Education dated November 13, 1973, Docket No. 73-2320, p. 19)

Moreover, the Board of Education's brief quoted the terms of Education Law, § 2590-j(3)(a)(1) which provides that the Board of Examiners "shall prepare and administer objective examinations to determine the merit and fitness of all candidates for . . . supervisory service positions . . ." and concluded that to obtain a permanent appointment to a supervisory position under New York law an applicant must ". . . pass an objective examination given by the New York City Board of Examiners". (Board of Education's Brief, pp. 26, 27)

* As noted above, the "interim" selection system continues in effect until the three prototype Step 1 examinations are announced.

630a 31. As is more fully shown in the accompanying affidavit of Dr. Julius R. Rubin, the Chairman of the Board of Examiners, when the Board of Education's delay first became apparent, the Board of Examiners informally attempted to expedite the Board of Education's adoption of the prototype job analyses; and when informal persuasion did not prove successful, the Board of Examiners instructed its counsel to bring the Board of Education's default to this Court's attention.

32. Moreover, as is more fully shown in the accompanying affidavit of Saul Z. Cohen, counsel to the Board of Examiners, despite pre-motion conferences with this Court on January 22 and March 4, 1976, the Board of Education has still not adopted the prototype job analyses required by the Consent Judgment.

The Courts Have Uniformly Called for the Implementation of Plenary Examinations as Soon as Possible.

33. Every court that has come in contact with this matter has expressed the view that plenary examinations created by the Board of Examiners should be administered by it forthwith. As long ago as July 14, 1971, Judge Mansfield, in his decision granting plaintiffs' motion for a preliminary injunction, stated:

> ". . . such relief may possibly lead the Board of Examiners, after taking another hard look at its examination procedures, to consider an overhaul that will not only eliminate racial discrimination, but lead to procedures that will be more adaptable to the Community School Board type of administration." 330 F. Supp. 203, 224 (1971).

34. When the Court of Appeals for the Second Circuit affirmed the issuance of a preliminary injunction, it specifically went out of its way to note that:

"The [district court] judge did not outlaw other written examinations or indicate that none could be created to test more fairly the qualities necessary for a supervisory job. It may well be that new testing procedures will be devised by the parties themselves and be approved by the district court. Certainly, the case should not linger on in its present unfinished state." 458 F.2d 1165, 1179 (1972).

35. When Judge Mansfield approved the 1973 settlement, he repeatedly noted his expectation that "a new permanent appointment system" should be rapidly adopted. In fact, Judge Mansfield preliminarily approved the settlement, only on condition that the Stipulation of Settlement be amended to include a provision whereby, within six months, the parties would either agree upon a new system of plenary examinations or would come back to Court to litigate that question. Thus, his May 21, 1973 decision held:

> "The ideal solution would be the immediate establishment of a new permanent appointment system. But like ancient Rome such a system, which requires a careful study and analysis of numerous complex factors bearing on job relatedness, fairness and evaluation of performance, cannot be built in a period of days or even of weeks. However, although we are prepared to accept and adopt the stipulation, we are persuaded that the parties should be stimulated to bend even greater efforts toward formulation of a final plan for a new permanent system within six months." (Emphasis added)

36. After notice of the settlement had been given and hearings had been held, Judge Mansfield rendered a decision on July 10, 1973 finally approving the Stipulation of Settlement. Again, he noted his expectation that permanent examination procedures would be agreed to by the parties:

> "We share the hope expressed by the New York Court of Appeals in Board of Education of the City of New York v. Nyquist, N.Y.2d ,

> N.Y.L.J. Mar. 12, 1973,* that a permanent examination procedure meeting constitutional requirements will be devised by the parties. However, the parties advise that a substantial additional amount of time will be required for the development of such a system, since agreement must be reached as to an overall plan and the plan must then be implemented by adoption of specific examination procedures for numerous positions."

37. Thereafter, when the Court of Appeals for the Second Circuit affirmed the District Court's approval of the settlement, it specifically noted the impropriety of continuing to permit permanent appointments pursuant to the "interim" on-the-job performance evaluation system and the desirability of "promptly" adopting "a permanent non-discriminatory testing system":

> "Finally, we must note that were the litigation to remain indefinitely in its unfinished state, the propriety of continuing to allow permanent appointments would be another matter. The interim tail would then be wagging the dog and the incentive for plaintiffs' class to obtain a permanent non-discriminatory testing system would diminish considerably and perhaps disappear. Indeed, we think too much time has already elapsed and we regret that the district court did not require the parties to adhere to the six-month time period it suggested in approving the settlement. Allowing another lengthy period of time to go by, thus creating further eligibles for permanent appointments as an 'interim' measure, would approach an abuse of discretion. Accordingly, while we affirm the judgment of the district court, we suggest that the litigation be promptly brought to a close, either by judicial resolution of contested issues or by settlement." 496 F.2d at 820, 825 (2nd Cir. 1974) (Emphasis added)

38. Finally, Judge Tyler concluded his April 1, 1975 memorandum decision accompanying the March 25, 1975

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* See 31 N.Y.2d 468, 474-475, 341 N.Y.S.2d 441, 446-447 (1973).

"Order Modifying Final Judgment and Order" by also noting the desirability of implementing the permanent system for plenary supervisory examinations "as soon as possible":

> "The community is entitled to the competitive examination licensing procedure, which its legislature has determined appropriate, as soon as possible. The community is also entitled to a system which satisfies constitutional standards. The March 25th order and Plan was entered to effectuate these goals as well as possible." (Emphasis added)

Conclusion.

39. As was shown above, the Board of Examiners had no obligation to reach agreement with either plaintiffs or with the Board of Education with regard to the content of new plenary examinations. It is indeed ironic that the Board of Examiners' efforts to reach such an agreement with the other parties has resulted in a delay in the creation and administration of new examinations of almost four years. This Court should not permit any further delay.

Murray Rockowitz

Sworn to before me this
16th day of April, 1976

Notary Public

MILTON WEINSTEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 60-9203400
Qualified in Westchester County
Cert. filed in Rockland County
Term expires March 30, 19[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BOSTON M. CHANCE, et al., :

Plaintiffs, :

against- : 70 Civ. 4141 (M.P.)

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al., : AFFIDAVIT

Defendants. :

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF Kings)

JULIUS R. RUBIN, being duly sworn, deposes and says:

1. I am Chairman of the Board of Examiners, am fully familiar with the facts herein and submit this affidavit in support of the Board of Examiners' motion to require immediate implementation of the Consent Judgment.

2. The "Order Modifying Final Judgment and Order" which was entered on March 25, 1975 approved the permanent Plan for a comprehensive system of plenary examinations for supervisors in the New York City school system and made that Plan part of the Consent Judgment. After that Order was entered, it was the expectation of the Board of Examiners that the Board of Education and its designated independent consultants, American Institutes for Research ("A.I.R.") would proceed expeditiously to prepare and adopt the three prototype job analyses required by the Plan. In fact, in the Spring of 1975, the Board of Examiners was already considering scheduling the first of the prototype

examinations for the Fall of 1975 in the expectation that the job analyses would be completed well before the end of the prior school year.

3. When it became apparent to the Board of Examiners that the Board of Education and A.I.R. were not proceeding expeditiously, I, acting as the Chairman of the Board of Examiners, and Saul Z. Cohen, the Examiners' counsel, informally attempted to expedite the Board of Education's adoption of the prototype job analyses. Thus,

A. In June 1975, at the request of the Board of Examiners, Mr. Cohen spoke with Harold Siegel, Secretary to the Board of Education, to inquire about the A.I.R. job analyses and was assured that A.I.R. was developing the prototype job analyses in accordance with the Plan.

B. During August and early September 1975, I made many telephone calls to Mr. Siegel, inquiring about the status of the A.I.R. analyses which I understand the Board of Education received in June 1975. At those times, I recommended that the Board of Education promptly review the analyses and act upon them.

C. On September 9, 1975 I met with Mr. Siegel and argued that the A.I.R. prototype job analyses should be promptly presented to the Board of Education for action.

D. On or about September 11, 1975 Mr. Siegel sent to each member of the Board of Education copies of the three completed A.I.R. job analyses, and recommendations by the Board of Education's six designated reviewers with regard to those analyses. Annexed as Exhibit C to this motion is a copy of Mr. Siegel's memorandum dated September 11, 1975.

E. By memorandum dated September 23, 1975, I informed Mr. Siegel that Development Dimensions, Inc., the Board of Examiners' independent consultants, had reviewed the A.I.R. job analyses and had concluded that they "can be used . . . towards the development of the prototype examinations in accordance with the final judgment of the Court. . . ." Copies of my memorandum and of Development Dimensions, Inc.'s letter dated September 16, 1975 are annexed as Exhibit D to this motion.

F. After further meetings between the parties, I wrote to Chancellor Irving Anker, by memorandum dated December 5, 1975, calling attention to "the protracted delay in the implementation of the Final Judgment" and requesting prompt action to facilitate the administration of prototype examinations in the Spring Term of 1976. A copy of that memorandum is annexed as Exhibit E to this motion.

4. When these repeated informal attempts to secure action proved unsuccessful, the Board of Examiners requested its counsel to take appropriate steps before this Court. As is shown more fully in the accompanying Cohen affidavit, as a result of our request, pre-motion conferences were held with this Court on January 22 and March 4, 1976, and, after further delay, this Court granted the Board of Examiners permission, under its rules, to make the instant motion.

5. Each of the members of the Board of Examiners is dedicated to carry out its statutory responsibility to "prepare and administer objective examinations to determine the merit and fitness of all candidates for . . .

supervisory service positions. . . ." New York Education Law § 2590-j(3)(a)(1). The Plan for plenary examinations contains a flexible blueprint for such examinations. The Board of Examiners should be allowed to implement that Plan forthwith.

Julius R. Rubin

Julius R. Rubin

Sworn to before me this
19th day of April, 1976

Mary M. Curran
~~Notary Public~~
Commissioner of Deeds

MARY M. CURRAN
Commissioner of Deeds, City of New York
Kings County Clerk - No. 2-551
Commission Expires July 1, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

BOSTON M. CHANCE, et al.,

Plaintiffs,

-against-

THE BOARD OF EXAMINERS AND THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, et al.,

Defendants.

70 Civ. 4141 (M.P.)

AFFIDAVIT

- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAUL Z. COHEN, being duly sworn, deposes and says:

1. I am a member of the firm of Kaye, Scholer, Fierman, Hays & Handler, counsel for the Board of Examiners herein. I have been in overall charge of the legal representation of the Board of Examiners in this action since its commencement in 1970 and am fully familiar with the matters set forth herein.

2. In view of the Board of Education's failure, by the end of 1975, to adopt the three prototype job analyses required by the Consent Judgment, as modified, the Board of Examiners instructed me to take action before this Court to implement that Judgment. In accordance with this Court's rules, I requested a pre-motion conference.

3. At that conference on January 22, 1976, counsel for the Board of Education pleaded for additional time to carry out its responsibilities under the Plan with respect to the job analyses. At no time during that conference was there any suggestion that the Board of Education

wished to modify that Judgment in any way. In fact, Michael Rosen, Esq., counsel to defendant Chancellor of the City School District, expressly stated that the Board of Education intended to carry out its responsibilities under the Plan. Accordingly, although this Court indicated that the Board of Education's conduct appeared to be contumacious, it agreed to a six-week adjournment of the pre-motion conference until March 4, 1976 so that the Board of Education could fulfill its responsibilities with respect to the job analyses.

4. At the adjourned conference on March 4, counsel for the Board of Education explained that it had rejected the three prototype job analyses which had been created by its consultants, and announced, for the first time, that the Board of Education wished to move to modify the Plan which is part of the Consent Judgment. The Board of Education's counsel also stated that it and plaintiffs' counsel were already in the midst of meetings with respect to such a modification and, for that reason, expressed reluctance to discuss details of it. Over my objections, this Court deferred action on the Board of Examiners' motion to implement the Consent Judgment and adopted a schedule for the Board of Education's motion to modify that Judgment.

5. When it became apparent that the Board of Education was not even proceeding expeditiously to move to modify the Judgment, my colleague, Howard A. Jacobson, wrote to this Court, on the Board of Examiners' behalf, requesting permission to make the instant motion. (A copy

of that letter is annexed as Exhibit F to this motion.) This Court thereafter granted such permission.

Saul G. Cohen

Sworn to before me this
19th day of April, 1976

Constance Vairo
Notary Public

CONSTANCE VAIRO
NOTARY PUBLIC, State of New York
No. 24-9421950
Qualified in Kings County
Commission Expires March 30, 1978

Exhibit A - Final Judgement, dated July 12, 1973
(Printed at pp. 250a-259a)

Exhibit B - Order of Judge Tyler (plus exhibit), dated March 25, 1975

(Printed at pp. 505a-538a)